

# NOMINATION OF FELIX FRANKFURTER

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HEARINGS  
BEFORE A  
SUBCOMMITTEE OF THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
SEVENTY-SIXTH CONGRESS  
FIRST SESSION  
ON THE  
NOMINATION OF FELIX FRANKFURTER TO  
BE AN ASSOCIATE JUSTICE OF THE  
SUPREME COURT

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JANUARY 11, and 12 1939

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# NOMINATION OF FELIX FRANKFURTER

SATURDAY, JANUARY 7, 1939

UNITED STATES SENATE,  
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D. C.*

The subcommittee met, pursuant to call, in the committee room, Capitol, at 10:40 a. m., Senator M. M. Neely (chairman) presiding.

Present: Senators Neely (chairman), King, McCarran, Connally, Hughes, Borah, Norris, Austin, and McNary.

Senator NEELY (presiding). The subcommittee has convened to consider the nomination of Prof. Felix Frankfurter for an Associate Justice of the Supreme Court. Gentlemen, what is your pleasure?

Senator KING. Mr. Chairman, have you any report from the Department of Justice or any protests or recommendations?

Senator NEELY. There is no report from the Department of Justice. Several telegrams and letters which pertain to the nomination lie on the table. Does the committee desire that they be inserted in the record?

Senator CONNALLY. I suggest that we defer putting those telegrams and communications in the record until we determine whether or not we will have a hearing. If we have a hearing, they can then be put in the record. Are any requests on file from anyone who desires to appeal?

Senator NEELY. Yes. The Chair just received one from Mr. George E. Sullivan, an attorney of Washington.

Senator CONNALLY. For or against.

Senator NEELY. Against. Mr. John B. Snow of New York and three or four others have indicated that they desire to be heard.

Senator NORRIS. Mr. Chairman, I have some telegrams which I shall be glad to submit to the committee. They do not exactly say they want hearings, but they say the matter ought to be investigated very fully, and give some reasons why confirmation should not take place.

Senator KING. Mr. Chairman, my view is this: In many of these hearings we do not get much light upon the question at issue. Nevertheless, this is supposed to be a democratic form of government, and with respect to filling an office of great importance, if any citizens in good faith desire to be heard, I feel that it is our duty to hear them. I think they should be accorded a full opportunity to be heard.

I suggest that the subcommittee take up, in executive session, these various communications for or against, and then determine whether we will have hearings; and if we conclude to hold hearings, determine

what course to pursue. I would not be in favor of putting any of these communications in the record at this time, until we determine whether or not we will hold hearings.

I move that we go into executive session and take up the telegrams and communications, determine whether or not we shall hold hearings, and whether or not these communications should be inserted in the record.

(The motion was agreed to, and the subcommittee went into executive session. At 11:30 a. m., at the conclusion of the executive session, the subcommittee adjourned until Tuesday, January 10, 1939, at 10:30 a. m., at which time a public hearing will be held.)

## NOMINATION OF FELIX FRANKFURTER

TUESDAY, JANUARY 10, 1939

UNITED STATES SENATE,  
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D. C.*

The subcommittee met, pursuant, to adjournment, in room 357, Senate Office Building, at 10:30 a. m., Senator M. M. Neely (chairman) presiding.

Present: Senators Neely (chairman), King, McCarran, Connally, Hughes, Borah, Norris, and Danaher.

Present also: Mr. Dean G. Acheson, representing the nominee.

After a preliminary discussion the committee voted to limit the time of witnesses to 30 minutes.

Senator NEELY. Those who have requested an opportunity to testify either for or against the confirmation of Prof. Felix Frankfurter for Associate Justice of the Supreme Court will now be heard.

### STATEMENT OF COLLIS O. REDD, NATIONAL DIRECTOR CONSTITUTIONAL CRUSADERS OF AMERICA

Senator NEELY. Please state your name.

Mr. REDD. My name is Collis O. Redd.

Senator NEELY. Whom do you represent?

Mr. REDD. I am national director of the Constitutional Crusaders of America, and they represent the interests of consumers, taxpayers, the unemployed, and old-age pensions; everybody but the C. I. O. and the A. F. of L. They don't want anything from my organization.

Senator NEELY. Are you authorized to speak for all those you have indicated?

Mr. REDD. Yes, sir.

Senator NEELY. Have you been commissioned by the C. I. O., the A. F. of L., and the unemployed to appear for them?

Mr. REDD. I am not representing the C. I. O. or the A. F. of L.

Senator NEELY. I understood you to say that you were.

Mr. REDD. Oh, no; not guilty. My program is in behalf of the taxpayers and the unemployed and others who have no interest in the A. F. of L. or the C. I. O.

Senator NEELY. Do you represent all of the unemployed?

Mr. REDD. I represent their interests; yes.

Senator NEELY. You are really appearing for yourself, are you not?

Mr. REDD. Yes.

Senator NEELY. Does any member of the committee desire to interrogate the witness?

Senator BORAH. I would like to ask if you have been authorized to appear here for those for whom you say you appear.

Mr. REDD. I represent their interests. I know that they want me to represent them. I took this upon myself. I appointed myself as a committee of one to represent these organizations. If they do not approve of it, that is a matter for them to decide. They need representation here, and I volunteered to do it.

Senator CONNALLY. You say you represent the old-age pensioners?

Mr. REDD. Yes.

Senator CONNALLY. Did Dr. Townsend authorize you to appear?

Mr. REDD. I am not guilty of representing Dr. Townsend.

Senator CONNALLY. Whom do you represent?

Mr. REDD. Our national cooperative recovery program, which has been presented to Congress, whether it be accepted or rejected.

Senator CONNALLY. Where is your office?

Mr. REDD. In Washington.

Senator CONNALLY. Where in Washington?

Mr. REDD. 1320 Twelfth Street NW.

Senator CONNALLY. What particular group of the unemployed do you represent? Do you represent the W. P. A. or any particular group?

Mr. REDD. The starvation army of the unemployed. They need representation.

Senator NEELY. You may proceed.

Mr. REDD. Well, I am opposed to the appointment of Mr. Frankfurter on democratic principles. In the first place, Mr. Frankfurter is recognized as being the father of the N. R. A., and we know that the N. R. A. was outlawed by the unanimous consent of the nine judges. Mr. Frankfurter must have known that that was contrary to our American traditions. In appointing a man like that on the Supreme Bench, the President has rewarded him for writing one of his brain-trust alphabetical organizations, which is in violation of our Constitution and American traditions. To put him on the Supreme Bench does not perpetuate ideas of liberalism as laid down by Thomas Paine, Thomas Jefferson, George Washington, Abraham Lincoln, and all the rest of the patriots. My interest in this fight is against the liberalism, as now called modern liberalism, as laid down by Frankfurter, Rosenman, Baruch, and President Roosevelt. If you want me to read the ideals laid down by Washington, I will do so.

Senator NEELY. That will not be necessary.

Mr. REDD. I want to read an article that corroborates my statement. This appeared in the column called the Washington Daily Merry-go-Round in the Washington Herald of January 6, 1939. It is entitled, "Jewish issue," and reads as follows:

While this pressure was at work, equally potent forces were putting in heavy hits against Frankfurter on another flank. Bernard Baruch, New York financier, and other prominent Jews quietly counseled the President against naming Frankfurter. They insisted they had nothing against his liberalism, but deemed it inadvisable to name a Jew to the Supreme Court at this time. It was then that Frankfurter asked friends not to consider his name and suggested Judge Joseph Hutcheson of the United States circuit court in Texas.

Finally, following the appointment of Frank Murphy to Cummings' place last Monday, Norris took the bull by the horns and went to the President direct.

Norris has a high regard for Murphy but favored the appointment of Solicitor General Robert Jackson, whom he considered particularly fitted for the Cabinet post. Norris felt Roosevelt was being swayed by the geographic argument, determined to halt it if he could on the Supreme Court vacancy.

He did.

He bluntly told the President that the court seat was too important to be decided on geographic considerations. Roosevelt agreed. And after weeks of shifting back and forth, the vacancy was nailed down definitely for Frankfurter.

Senator NEELY. Are you objecting to Senator Norris or to Dr. Frankfurter?

Mr. REDD. It is an objection to Senator Norris's idea of liberalism, the perpetuation of things this man stands for which are not in accord with American traditions.

Senator NEELY. Do you want the committee to punish Senator Norris?

Mr. REDD. No. I will leave that to the public. The committee does not have to do that.

There was a good deal of pressure brought to bear on the President. I don't think the appointment would have been made if it hadn't been for Senator Norris. They saw what was before them.

I would like to read another article that was published by a Russian Jewess, that I am heartily in sympathy with.

Senator NEELY. What is her name, and where does she live?

Mr. REDD. Her name is Ethel M. Hunt, and she lives at 5505 Connecticut Avenue, in Washington. I met her at a forum meeting, where I had something to say about the Jewish situation. She is a Russian Jewess who wanted to give her side of the story about the Jewish situation. She wrote this article in an attempt to clarify the feeling against the Jews. It is addressed to the editor of the Star, and headed, "Defines Understanding of Assimilation," and was published in the Washington Star of December 12, 1938, and reads as follows:

In one of the last week's issue of the Star there appeared a letter in which the writer suggested that, since the Jews cannot be assimilated in any country, they be given land in Africa and Asia where all the Jews can go and be happy together.

Please permit me as a Jewess to express how I understand the meaning of assimilation. The ancient prophets and patriarchs did not mean not to mingle with people who have advanced to spiritual attributes. The Jew was not supposed to assimilate satanic qualities. The wrestling of Jacob with the angel is a good example.

I feel the Jews have now another chance to go back to the spirit of their heritage, which is humility, patience, and faith; above all, love for God and continual prayer that God may make them and all humanity see that a Messianic cycle is at hand, and that only through the sovereign power of a Messiah can the Jew, and all humanity, be saved from the satanic power of the present Pharaohs.

I have a telegram which came this morning that I want to read.

Senator NEELY. Does it pertain to the qualifications of Dr. Frankfurter? If it does not, the committee will probably decline to hear it.

Mr. REDD. It manifests the feeling in regard to Mr. Frankfurter being a Jew. I have nothing against him for being a Jew.

Senator NEELY. The article you just read does not relate to the question before the committee, which is whether Mr. Frankfurter possesses the necessary qualifications for confirmation as an Associate Justice of the Supreme Court.

Mr. REDD. I do not know that it would altogether satisfy that, but it clarifies the question as to the appointment of a Jew, and of his being capable of taking that position.

Senator NEELY. Do you want the committee to understand that you are against Mr. Frankfurter because he is a Jew?

Mr. REDD. No; not at all. I will read this. It is in reference to the appointment of Mr. Frankfurter. It just came to me this morning. It is dated at Brooklyn, N. Y., January 9, and reads as follows:

COLLIS REDD,

1320 Twelfth Street NW.,

*Constitutional Crusaders of America, Washington, D. C.:*

Why not an American from Revolution times instead of a Jew from Austria just naturalized? Time something was done?

That is signed by J. E. Healey.

Senator NORRIS. An American from Revolution times would be too old.

Mr. REDD. Senator Norris, pardon me, but I don't think that he meant just that.

Senator BORAH. Are you opposing Mr. Frankfurter on the ground that he is a Jew?

Mr. REDD. No, sir.

Senator BORAH. Then why drag these things into the record? Nobody has accused you of being opposed to his confirmation because he is a Jew, so far as I know. I should think you would leave those things out of the record.

Mr. REDD. I didn't suggest it to him. That is a telegram he sent me.

Senator BORAH. I do not see the need of taking up time on a matter not in issue before the committee.

Mr. REDD. He told me why he was opposed to him.

Senator BORAH. Are you opposed to him on that ground?

Mr. REDD. I am opposed to him as being the author and brain trust of the N. R. A. That is my objection, for writing a measure that is in violation of our constitutional form of Government, and being a lawyer, he should have known that. He corresponds more to the theories of Russian Communism, instead of upholding the liberal ideals of the founders of this country. That is what I have against the gentleman. He is in favor of these new ideas of brain trusting and not of the ideas of the Founding Fathers. He has demonstrated that on many occasions, and I have shown it in the whole set-up of the recovery program that I have given to Congress.

Senator CONNALLY. What would you do with the majority of the Senate that voted for it? Would you throw them out?

Mr. REDD. Voted for what?

Senator CONALLY. The N. R. A. You are complaining of Frankfurter because he is reputed to be the father of the N. R. A. That is all you have against him, is it not?

Mr. REDD. Yes.

Senator CONNALLY. The majority of the Members of the Senate and the House voted for the N. R. A.

Mr. REDD. If the Senators had looked into that, along with a number of other things, they never would have passed it.

Senator CONNALLY. Would you throw the Senators out or disqualify them from being Senators, on account of having voted for the N. R. A.?

Mr. REDD. I am not saying against the Senators. If they had examined the N. R. A. and what the Constitution calls for, they never would have accepted it.

Senator McCARRAN. Is that the only basis for your objection to the nominee?

Mr. REDD. Well it is the whole situation, the general fight between the liberalism of our ancestors and the liberalism of Frankfurter, Rosenman, and Roosevelt, the new ideal of liberalism, which is in opposition to our American traditions of government laid down by these men I have spoken of.

Senator McCARRAN. Is it your contention that Frankfurter's ideas of liberalism are contained in his writing the N. R. A.?

Mr. REDD. Yes.

Senator McCARRAN. And you object to him for that reason?

Mr. REDD. Yes. It was outlawed by the 9 judges, and then for the President to appoint him on the Supreme Bench, I think is a direct violation and debauchery of liberalism.

Senator McCARRAN. And that is your entire objection?

Mr. REDD. Yes.

Senator CONNALLY. How do you know Frankfurter was the father of the N. R. A.?

Mr. REDD. It is conceded.

Senator CONNALLY. Who conceded it? What proof do you have of it, besides your imagination?

Mr. REDD. I will give it to you right now.

Senator CONNALLY. Did you ever confer with him about it? Did you ever write him a letter about it?

Senator NEELY. Senator Connally asked you a question which you have not answered.

Mr. REDD. What was that?

Senator CONNALLY. Did you ever write Mr. Frankfurter about it?

Mr. REDD. I have not had the time. I did not know you were going to be here until I filed my papers.

Senator CONNALLY. What kind of proof is it?

Mr. REDD. I haven't it with me. I thought I had it here. I can furnish it.

Senator CONNALLY. What kind of proof is it?

Mr. REDD. It was published in a Jewish magazine.

Senator CONNALLY. Do you believe everything you see in the papers?

Mr. REDD. No. I would be crazy if I did, especially the Washington papers, but this ought to be authentic. It said at that time that Mr. Frankfurter was the close adviser of the President, and was also responsible for drafting the N. R. A.

Senator CONNALLY. Do you not know that Mr. Richberg and General Johnson were the authors of the N. R. A.? You have been around Washington a long time, have you not?

Mr. REDD. They probably helped Mr. Frankfurter out. He probably had the brains, but those fellows might have wrote it for him. He was the brain trust and was responsible for these alphabetical panaceas.

Senator CONNALLY. That is the basis of your information, is it?

Mr. REDD. As further evidence of what I am telling you, it is in the record and filed with Chairman Dies, of the committee investigating un-American activities in the United States Congress.

Senator CONNALLY. Did you put it on file there?

Mr. REDD. Yes; to substantiate my statement here, and you can have it for your record.

Senator CONNALLY. When did you last have a meeting of the Constitutional Crusaders? Have you had a convention anywhere?

Mr. REDD. We are going to have a national convention on February 1.

Senator CONNALLY. You have not had any so far?

Mr. REDD. No; but we realize the need of one now under present conditions.

Senator CONNALLY. How much dues do you pay as a Crusader?

Mr. REDD. I have not capitalized it yet; I have not commercialized it.

Senator CONNALLY. You call it the Constitutional Crusaders of America. How many members have you?

Mr. REDD. The membership is composed of consumers and taxpayers and unemployed, probably about 90 percent of the population. If you don't believe it, I will submit my program to you.

Senator CONNALLY. Apparently you represent everybody but Dr. Frankfurter.

Mr. REDD. And the C. I. O. and the A. F. of L.

Senator CONNALLY. Did you ever have a meeting of the Crusaders or are you just the organization yourself?

Mr. REDD. I am the whole thing myself.

Senator CONNALLY. You are the Constitutional Crusaders of America?

Mr. REDD. Yes.

Senator CONNALLY. How many are you?

Mr. REDD. I have appointed myself as a committee of one to combat the evils in our Government, and I know they are all back of that program; not this hearing altogether but the program I have submitted to the Congress, and I know that they will endorse it 100 percent.

Senator CONNALLY. They are away back of it, are they not?

Mr. REDD. No; not away back of it. On February 1 we will hold our national convention, and that will be put up to them. They can accept it or turn it down. If they turn it down, the Constitutional Crusaders will go out of business.

Senator NEELY. Have you any additional specific objection to this nomination?

Mr. REDD. No, sir.

#### STATEMENT OF GEORGE E. SULLIVAN, WASHINGTON, D. C.

Senator NEELY. Please state your name.

Mr. SULLIVAN. My name is George E. Sullivan.

Senator NEELY. Do you live in Washington?

Mr. SULLIVAN. I live in Washington, and have lived here all my life.

Senator NEELY. State whom you represent.

Mr. SULLIVAN. I am appearing as an American citizen, an American lawyer of 36 years of actual and active continuous practice, and as a writer and author of various matters, including two booklets, one of



which I wrote in October 1936, called "Academic Freedom," and the other in October 1937, called "Wolves in Sheep's Clothing." I therefore do not represent the universe, as did the previous witness.

Senator CONNALLY. Do you live in Washington?

Mr. SULLIVAN. I live in Washington. I am a native-born citizen of the District of Columbia. I will be very brief.

The grave reasons standing in the way of confirmation of this nomination may be briefly stated.

#### I. ALIEN BORN

Every member of the Supreme Court of the United States since its beginning has been a native-born citizen with a single exception, and that exception, former Justice Sutherland, came from the mother country which also gave birth to our Bill of Rights. Continental Europe, where regimentation ideas usually predominate, has never been permitted to furnish a single member of our Supreme Court.

The reason for the general policy excluding alien-born persons from membership on the Supreme Court is obvious. That Court may actually (if not legally) exercise more power for the weal or woe of our Republic than the President of the United States and all other depositories of power in the Federal Government combined, and a single vote in said Court may decide the fate of the Republic. Consequently, the purpose of the absolute constitutional bar expressly imposed against an alien-born person becoming President of the United States is truly awakening as to the even greater necessity for a like exclusion in the membership of the Supreme Court.

Surely, there is nothing in the Constitution prohibiting a general policy excluding alien-born persons from the Supreme Court. If an exception is ever made in favor of an alien-born person from continental Europe, it certainly ought not to be during a special period of world unrest, like the present, when the subversive forces of internationalism are engaged in insidious maneuvers to destroy our Republic.

According to *Who's Who in America* and *Who's Who in American Jewry*, Mr. Frankfurter was born November 15, 1882, in Vienna, Austria.

#### II. ALIEN-MINDED AFFILIATIONS

Mr. Frankfurter's alien-minded affiliations do not inspire confidence in him as fit to be an American official of any kind, much less a member of our highest judicial tribunal. Before 1921, Frankfurter was serving as a member of the national committee of the so-called American Civil Liberties Union, which union has been largely engaged in defending as so-called civil-rights activities urging the "overthrow of the Government by force or violence" (vol. II, pp. 1985-1989, Report of Joint Legislative Committee of the State of New York Investigating Seditious Activities, published in 1920). Frankfurter was shown to be connected with those activities at that time, and also other affiliated organizations which dealt with the objectives and activities set forth by the American Civil Liberties Union.

Senator McCARRAN. May I interrupt you?

Mr. SULLIVAN. Yes.

Senator McCARRAN. Did you find whether Mr. Frankfurter was a member of any other organizations?

Mr. SULLIVAN. This report also shows that he, as a member of that national committee, along with other members of the committee, was also a member of many other interlocking subversive organizations. It is set forth in volume I, page 1101.

May I proceed?

Senator McCARRAN. Yes.

Mr. SULLIVAN. Frankfurter's espousal of such undeniably un-American proposition accords with his willingness to have as collaborators on such national committee a number of notorious reds, including William Z. Foster, Communist candidate for President of the United States, who brazenly declared in his 1928 acceptance speech:

When a Communist heads a government in the United States—and that day will come as sure as the sun rises—that government will not be a capitalist government but a soviet government, and behind this government will stand the “red” army.

Senator BORAH. Do you wish the committee to understand that Mr. Frankfurter was associated with Foster with reference to that statement you have just quoted?

Mr. SULLIVAN. Not with reference to that statement, but he was associated with that man.

Senator BORAH. In what respect?

Mr. SULLIVAN. As a member of the national committee of the American Civil Liberties Union.

Some of such notorious personages have also served with Frankfurter in other groups formed for alien-minded purposes, including the International Committee for Political Prisoners.

The expression “political prisoners,” was really being used to cover this program of seditious activities and urging the use of force and violence to overthrow our Government. When Frankfurter deliberately chose such alien-minded affiliations, he, of course, subjected himself to the rational and unerring maxims—“A man must be judged by the company he keeps,” and “Birds of a feather flock together.”

Your committee may be interested in knowing that a political pamphlet was published by the American Civil Liberties Union, called “Isms,” which is a further authentic declaration of the American Civil Liberties Union, with a photostatic copy of a letterhead as recently as 1936, carrying Mr. Frankfurter still as a member of the national committee. The records of that organization will show that as late as 1935 they sent in their annual report, still advocating the overthrow of our Government by force and violence.

How can such a person aspire to membership on the Supreme Court of the United States? Are his standards so lacking or twisted that he fails to comprehend that a member of the Supreme Court must be above suspicion of the slightest kind or character? Does he think that those who have taken oaths to support the Constitution of the United States regard those oaths so lightly that they are willing to jeopardize our Republic by putting on the Supreme Court a person not shown to be altogether above suspicion?

## III. HIS OWN ALIEN-MINDEDNESS

Fundamental Americanism upholds at all times law and order, and, consequently, has no possible place for "irregular oppositions" to governmental authority, such as advocacy of "overthrow of the Government by force or violence." Washington emphatically so declared in his Farewell Address. The Supreme Court of the United States also declared so in *Gitlow v. New York*, 268 U. S. 652 (decided in 1925), refusing to protect as "freedom" Communist advocacy of violent overthrow of organized government, the Court saying:

That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantial evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measure necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency (p. 669).

How long would any government endure, if a contrary ruling were made by its highest judicial tribunal? And yet both Holmes and Brandeis recorded their dissents in the *Gitlow* case, and Frankfurter, whose views have been widely proclaimed as in accord with the Holmes-Brandeis tradition has made plain that his own view, in this immediate connection, is the same as theirs, by the following assertion, in one of the principal leaflets of the American Civil Liberties Union, called "Civil Liberty," with Frankfurter's name carried as a member of its national committee—

Laws purporting to prevent the advocacy of the "overthrow of the Government by force or violence" are all violations of the right of free speech (vol. II, p. 1985, report of joint legislative committee of the State of New York investigating seditious activities, published in 1920).

Senator McCARRAN. From what are you quoting?

Mr. SULLIVAN. The program of the American Civil Liberties Union, published over the names of the national committee, including Frankfurter, and buried in the report of the New York committee to which I have referred.

Laws purporting to prevent the advocacy of the "overthrow of the Government by force or violence" are all violations of the right of free speech (vol. II, p. 1985, report of joint legislative committee of the State of New York investigating seditious activities, published in 1920).

How much dependence can be placed in an oath to support our Constitution when taken by a person whose mentality or morality is so twisted that he respects as "freedom" advocacy or overthrow of the Government by force or violence? He necessarily knows that subversive forces always contrive to take their victims by surprise and that, consequently, a recognition of such pretended freedom

would constitute a withdrawal of all practical defense of our Republic against the enemies within the gate.

Frankfurter's obvious disregard of fundamental Americanism back in 1917 caused Theodore Roosevelt to write Frankfurter on December 19, 1917—

You have taken, and are taking, on behalf of the administration an attitude which seems to me to be fundamentally that of Trotsky and the other Bolshevik leaders in Russia; an attitude which may be fraught with mischief to this country (Introduced into the Congressional Record, May 12, 1930, by Senator Walsh, of Massachusetts).

Senator NEELY. Have you read Dr. Frankfurter's reply?

Mr. SULLIVAN. I do not believe that was introduced in the Congressional Record.

Senator NORRIS. Oh, yes, it was.

Mr. SULLIVAN. I do not have it. I do not object to its going in.

Senator NEELY. The letter from President Theodore Roosevelt and Dr. Frankfurter's reply to it will be inserted in the record.

(The matter referred to, contained in the Congressional Record, vol. 72, pt. 8, pp. 8715-8717, May 12, 1930, 71st Cong., 1st sess., is here set forth in full, as follows:)

#### PROF. FELIX FRANKFURTER EXPLAINS HIS RECORD

"MR. WALSH of Massachusetts. Mr. President, during the debate on the confirmation of Judge Parker the Senator from Ohio [Mr. Fess] made some reference to Prof. Felix Frankfurter, a member of the faculty of the law school of Harvard University. The Senator from Ohio said during the course of his remarks:

"Then there is Prof. Felix Frankfurter, member of the national legal committee, well-known defender of revolutionary radicals, denounced by the late President Roosevelt as 'engaged in excusing men precisely like the Bolsheviks in Russia, who are murderers and encouragers of murder'—that is the language of Colonel Roosevelt—and others along that line."

"Professor Frankfurter has written me a letter with reference to the statement made by the Senator from Ohio which I have quoted, and has also sent me a copy of the letter which he received from President Roosevelt and his reply to that letter. In justice to Professor Frankfurter, I ask that the letter may be inserted in the Record.

"The VICE PRESIDENT. Without objection, it is so ordered.

"The letters referred to are as follows:

"LAW SCHOOL OF HARVARD UNIVERSITY,  
Cambridge, Mass. May 9, 1930.

"HON. DAVID I. WALSH:

"I note from the Congressional Record of Tuesday, May 6, 1930, that Senator Fess, screening behind the parliamentary privilege, has made himself the vehicle for exploiting once more the slanderous nonsense contained in the now discredited Lusk committee report.

"Speaking of me on page 8435 of the Record, Senator Fess quotes a phrase taken from a letter of Colonel Roosevelt to me without mentioning the context of the letter, its subject matter, or the nature of my reply. It occurs to me that in view of this unjustifiable performance of Senator Fess you might deem it appropriate to put in the Record the correspondence between Colonel Roosevelt and me, which will put Senator Fess' quotation in its proper setting.

"This correspondence, as you doubtless know, grew out of the report of President Wilson's Mediation Commission, of which I was counsel, in regard to the Blisbee deportations and the *Mooney case*. I inclose herewith copies of the correspondence for such use as you may deem appropriate. Colonel Roosevelt's letter has been widely published from time to time, but my reply has seen the light of day only in the Boston Transcript for April 20, 1927. Its publication was in reply to the publication of the Roosevelt letter in the Transcript of the day before.

"Sincerely yours,

"FELIX FRANKFURTER."

"MY DEAR MR. FRANKFURTER: I thank you for your frank letter. I answer it at length because you have taken, and are taking, on behalf of the administration an attitude which seems to me to be fundamentally that of Trotsky and the other Bolshevik leaders in Russia; an attitude which may be fraught with mischief to this country.

"As for the conduct of the trial, it seems to me that Judge Dunne's statement, which I quoted in my published letter, covers it. I have not been able to find anyone who seriously questions Judge Dunne's character, judicial fitness, and ability or standing. Moreover, it seems to me that your own letter makes it perfectly plain that the movement for the recall of Fickert was due primarily not in the least to any real or general feeling as to alleged shortcomings on his part but to what I can only call the Bolshevik sentiment. The other accusations against him were mere camouflage. The assault was made upon him because he had attacked the murderous element, the dynamite and anarchy group, of labor agitators. The movement against him was essentially similar to the movements on behalf of the McNamaras and on behalf of Moyer and Hayward. Some of the correspondents who attacked me frankly stated that they were for Mooney and Billings just as they had been for the McNamaras and for Moyer and Hayward. In view of Judge Dunne's statement it is perfectly clear that even if Judge Dunne is in error in his belief as to the trial being straight and proper, it was an error into which entirely honest men could fall.

"But the question of granting a retrial is one thing. The question of the recall is entirely distinct. Even if a retrial were proper, this would not in the least justify a recall any more than a single grave error on your part would justify your impeachment or the impeachment of President Wilson for appointing you. Fremont Older and the I. W. W. and the "direct action" anarchists and apologists for anarchy are never concerned for justice. They are concerned solely in seeking one kind of criminal-escape justice. The guiding spirits in the movement for the recall of Fickert cared not a rap whether or not Mooney and Billings were guilty; probably they believed them guilty; all they were concerned with was seeking a rebuke administered to and an evil lesson taught all public officials who might take action against crimes of violence committed by anarchists in the name of a professed social movement. It was no mere accident, it was the natural sequence of cause and effect that the agitation for the recall of Fickert, because he had fearlessly prosecuted the dynamiters (and, of course, no human being doubts that Billings and Mooney were in some shape or other privy to the outrage) should have been accompanied by the dynamite outrage at the Governor's mansion. The reactionaries have in the past been a great menace to this Republic; but at this moment it is the I. W. W., the Germanized socialists, the anarchists, the foolish creatures who always protest against the suppression of crime, the pacifists and the like, under the lead of the Hearsts and La Follettes and Bergers and Hillquists, the Fremont Olders and Amos Pinchots and Rudolph Spreckles, who are the really grave danger. These are the Bolsheviks of America; and the Bolsheviks are just as bad as the Romanoffs, and are at the moment a greater menace to orderly freedom. Robespierre and Danton and Marat and Herbert were just as evil as the worst tyrants of the old regime, and from 1791 to 1794 they were the most dangerous enemies to liberty that the world contained. When you, as representing President Wilson, find yourself obliged to champion men of this stamp, you ought, by unequivocal affirmative action, to make it evident that you are sternly against their general and habitual line of conduct.

"I have just received your report on the Bisbee deportation. One of the prominent leaders in that deportation was my old friend Jack Greenway, who has just been commissioned a major in the Army by President Wilson. Your report is as thoroughly misleading a document as could be written on the subject. No official, writing on behalf of the President, is to be excused for failure to know and clearly to set forth that the I. W. W. is a criminal organization. To ignore the fact that a movement such as its members made into Bisbee is made with criminal intent is precisely as foolish as for a New York policeman to ignore the fact that when the Whyo gang assembles with guns and knives it is with criminal intent. The President is not to be excused if he ignores this fact, for, of course, he knows all about it. No human being in his senses doubts that the men deported from Bisbee were bent on destruction and murder. If the President, through you or anyone else, had any right to look into the matter, this very fact shows that he had been remiss in his clear duty to provide against the very

grave danger in advance. When no efficient means are employed to guard honest, upright, and well-behaved citizens from the most brutal kind of lawlessness, it is inevitable that these citizens shall try to protect themselves; this is as true when the President fails to do his duty about the I. W. W. as when the police fail to do their duty about gangs like the Whyo gang; and when either the President or the police, personally or by representative, rebuke the men who defend themselves from criminal assault it is necessary sharply to point out that far heavier blame attaches to the authorities who fail to point out the criminal character of the anarchistic organization against which the decent citizens have taken action. Here, again, you are engaged in excusing men precisely like the Bolsheviks in Russia, who are murderers and encouragers of murder, who are traitors to their allies, to democracy, and to civilization, as well as to the United States, and whose acts are nevertheless apologized for on grounds, my dear Mr. Frankfurter, substantially like those which you allege. In times of danger nothing is more common and nothing more dangerous to the Republic than for men—often ordinarily well-meaning men—to avoid condemning the criminals who really are public enemies by making their entire assault on the shortcomings of the good citizens who have been the victims or opponents of the criminals. This was done not only by Danton and Robespierre but by many of their ordinary honest associates in connection with, for instance, the "September massacres." It is not the kind of thing I care to see well-meaning men do in this country.

"Sincerely yours,

"THEODORE ROOSEVELT."

#### "THE FRANKFURTER REPLY TO THE ROOSEVELT LETTER

"In answer to Theodore Roosevelt's letter, which bitterly criticized Prof. Felix Frankfurter for his activity in the Mooney dynamiting case in California and the Bisbee deportations in Arizona—a letter printed in Wednesday's Transcript—Mr. Frankfurter wrote as follows to Colonel Roosevelt:

"My Dear Colonel Roosevelt: Your letter came while I was still in the West, and so has been delayed in acknowledgment.

"You are good enough to write me at length about the Flickert recall and the Bisbee deportations because you conceived that they involve issues of important relevance to the effective prosecution of the war and the purposes to which that war is dedicated. I agree that the effective prosecution of the war and the uncompromising adherence to the aims for which this war is pursued by us embody the true test of all judgment and action these days. It is important, therefore, not to confound issues, to be sure-footed in our knowledge of facts and in our discernment of what really affects the national well-being. It is as important vigorously to promote patriotic purposes as it is to prevent ignorance or selfishness or prejudice from using the disguise of patriotism for ends alien to the national interest.

"(1) You refer to a letter of mine to you about the Flickert recall. I assume you mean the telegram I sent to Buckner, in which I asked him to say to you that the Flickert recall was not a battle between the forces of darkness and the forces of light, between anarchy and patriotism, but that it was complicated by a variety of local issues which I assumed were foreign to your interest, as well as to your knowledge. I did not express, for I did not have and do not have an opinion on the merits of that recall. It was strictly a local issue, a concern to the people of San Francisco, but of no concern to an outsider. Staunch friends of yours in San Francisco, people moved by the war as much as you or I, interpreted the recall issue not at all as you have been led to interpret it. So I was led to send word to you through Buckner, not in any wise because I was opposed to Flickert or favored his recall or had any views on that subject but because my sense of your significance was disturbed that you should be led to intervene in a petty local fight having no national significance at all. I felt then and feel now that fictitious use has been made of you by selfish and extreme people on both sides of the fight or by uninformed outsiders. I am sure that you have no more devoted and no wiser friend on the coast than Chester Rowell. The views I wired to Buckner, the views that I give expression to here, are precisely the line of thought that Rowell and I reached. I believe he so advised you. Insofar as you assumed I entertained opinions on the merits of the recall, you attribute views to me which I have never entertained. This it is that makes me feel that you may have had in mind the letter of another correspondent in writing me.

"One of the things that the commission to which I was attached was charged with studying was the *Mooney cases*. By this time, of course, you know that the attention of the Government and of this country was directed to the *Mooney cases*, of the alleged perversion of justice in these cases, through Russia. The circumstances surrounding those persecutions were among the strongest of certain incidents involving our national life which were made the basis of prejudicial propaganda against us in Russia. In a word, it affected the unity of our Russian ally and the relations of Russia to this country. Therefore, the quiet informal investigation which we actually undertook was justified by the highest consideration of the effective conduct of the war. The chief share in the investigation of the situation naturally fell to me as the lawyer of the commission. I think if you knew all the facts, I think if you inquired of those who see fairly and without blind passion, in San Francisco, you would find that I pursued the inquiry in a thoroughgoing, judicial, and, if I may say so, sensible way. The result of this investigation is not yet known, for we have not yet rendered a report to the President, nor even written it. I am sure even as to the proper disposition of the *Mooney cases*—which I insist is wholly apart from the wisdom of your participating in the recall fight in San Francisco—you and I, if we sat down to talk it over, would not disagree.

"(2) The Blsbee deportations took place when I was abroad. I did not even read the contemporaneous news stories about them. I can fairly say that when I started for Arizona late in September my mind was wholly free from an opinion in regard to these deportations. I had heard some strong views of condemnation; I had also heard an explanation highly sympathetic to those who engaged in the deportations. I began to study the fact and circumstances on the ground with the same conscientious purpose to ascertain the facts, and nothing but the facts, as that which I pursued when associated with Stimson in the Morse, sugar frauds, and other cases; not only with the same conscientious purpose, but I am sure also with the same ability to ascertain and weigh facts impartially, which by training and temperament is part of my very professional equipment. What is set down in the report to which my name is signed is truth, the truth painstakingly pursued, sifted and tested on the spot, seeking to vindicate neither a preconceived theory nor influenced by any personal attachment. If there be any inaccuracy in the document, the inaccuracy is in understatement of the total want of justification on the part of those who participated in the deportations. This is not to say that those who participated were not impelled by patriotic purposes; that they were not sincere men. The report, on the contrary, attributes sincerity of purpose of these men. But surely sincerity, that is, the consciousness of a good purpose, not infrequently is the attendant of action unjust and evil in its results. I know you know Jack Greenway. I knew you knew him, and I knew your great belief in him when I pursued the inquiry and legitimately had it in mind in trying to understand the situation and reach a just judgment in regard to the conduct of men like Jack Greenway. Surely, however, it is not a law of necessity that whatever Jack Greenway does is right.

"I submit it is not fair to your own standards of impartial justice, to your characteristic of being openminded to facts, for you, some 3,000 miles away from the scene of action, away from an intimate study of the facts—the circumstances, the personnel, the industrial conflict, a great complex of elements which resulted in the deportations—I say it is not fair for you to pass judgment upon the deportations just on Jack Greenway's say-so; to brush aside the conclusion of a trained and impartial investigator, whose desire and ability to obtain the truth you have heretofore had many occasions never to find wanting. Affection must not take the place of impartial investigation. Unproved dogmatism, such as the statement "no human being in his senses doubts that the men deported from Blsbee were bent on destruction and murder" must yield to evidence disproving such dogmatism. When opportunity offers I should like to go over with you in detail the whole industrial situation in Arizona and to make you realize the clash of economic forces that are at stake; make you realize the long, persistent, and organized opposition to "social justice," to the establishment of machinery for the attainment of such justice, which culminated in strikes in the Arizona copper districts last year. It is easy to disregard economic abuses, to insist on the exercise of autocratic power by raising the false cry of "disloyalty." It is too easy. If you had traveled through the Southwest and the Northwest as I have in the last few months and had come into intimate contact with what is going on beneath the surface, studied the forces that are gathering in the

industrial world of the United States, I am sure you would feel, as I feel, that but for an almost negligible percent, all labor is patriotic, is devoted to the purpose of the war and its prosecution, but that there are industrial conditions which demand remedy, and quick remedy; that the masses insist upon an increasing share in determining the condition of their lives. If we do not bestir ourselves to rectify grave and accumulating evils, we shall find the disintegrating forces in our country gaining ground.

"May I commend to you the recent reports made to Lloyd George by the commissions of inquiry into industrial unrest in England? I am taking the liberty of sending you a copy of those reports under separate cover. I should like to call your attention particularly to the report of the commission for the northwest area headed by His Honor Judge Parry. What they say of England is true of this country, namely, that we need a new set of ideas as to industrial relationships, and that uncorrected industrial grievances are the most fertile soil for extreme propaganda.

"Moreover, many of the extreme men approached us in a kindly spirit and stated their views with reasonable moderation. They made a great point of their loyalty to the country and repelled openly and with indignation the suggestion which they said had been made against them, that "they were bought with Prussian gold." Still, the causes of unrest, as we have shown, are serious, and the Government should without delay do something very clear and evident on entirely different lines to the way in which things have been allowed to drift on in the past to show the people that they are in earnest in shouldering their responsibility. If not, the Government will only assist the extreme men by leaving inflammable material to their hand, and they will lose support of the large body of moderate, sensible workingmen who feel that they have been deserted, and thus even these men may in their time become adherents of a wild cause in which at present they have no real belief \* \* \*. We think that what is driving many well-meaning enthusiasts into very extreme propaganda is the hopeless feeling that they have no place or voice in the management of the work they are doing, and that the only way in which they can assert their knowledge and individuality is by promoting disorder and thereby calling attention of the authorities to things which all reasonable men agree are wrong.

"Surely you must know what a great sadness it is for me to find disagreement between us on important issues. I speak from the heart. Personal considerations, however, must sink into indifference these days. But there is a great public interest at stake. You are one of the few great sources of national leadership and inspiration for national endeavor. I do not want to see that asset made ill use of. I do not want to have your generosity played upon by local or personal interests. I want your great strength left unimpaired and undiverted for the Nation to which you belong.

"Faithfully yours,

"FELIX FRANKFURTER.

"Col. THEODORE ROOSEVELT."

Senator NEELY. Mr. Sullivan, you may proceed.

Mr. SULLIVAN. A very recent Associated Press dispatch published January 8, 1930, asserts:

A third of the Court, with Dr. Frankfurter's confirmation, will be remolded to exert an influence on its constitutional constructions, long after President Roosevelt leaves office.

In view of his record, what good influence on constitutional constructions could be expected of Frankfurter? It is hardly reasonable to expect that he would respect the Constitution as the written bible of the American Republic with fixed meaning to its terms and provisions, and which (as the Father of our Country declared)—

until changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all (Washington's Farewell Address).

Of what does his heralded "liberalism" consist? Is he liberal toward the enemies of our Republic, or liberal toward the defense of our Republic against its enemies? Liberal toward "change by usurpa-



tion" (against which the Father of our Country gave solemn warning), or liberal in taking every precaution against any such usurpation? In other words, does he regard the Federal Constitution as one prescribing limited and defined powers unchangeable by the Supreme Court and changeable only by an explicit and authentic act of the whole people in the mode prescribed in the Constitution itself? Or does he contend that the Supreme Court requires a group of men adequately equipped "to wield the people's power" and that "the Supreme Court is the Constitution," as boldly declared by him in the May 1930 issue of *Current History* published by the *New York Times*?

With his undeniable record would it not be a plain insult to the intelligence of the American people to now seek, or obtain, from Frankfurter assurances that his views and attitudes have ceased to be alien-minded and become Americanized? Obviously, it could furnish no protection any more than would his lip service to an oath to support the Constitution in view of his record.

The real question is, whether loyal Americans are willing to accept Frankfurter, and his group, as new fathers of our country, in the place and stead of George Washington? The soundness of George Washington's warning, that the written word in our Constitution, which is the bible of our Republic, should not be altered or varied by so-called construction, constituting change by usurpation, is apparent to all sound-thinking persons. In fact, Washington was, in effect, reiterating a similar warning given by Christ to a group of Jews called Pharisees on account of their presumptuous attempts to alter or vary the Written Word of God:

Why do you also transgress the Commandment of God for your tradition? (St. Matthew, ch. 15, v. 3.)

Senator BORAH. Have you any quotations from Mr. Frankfurter himself, over his own signature, purporting to be his own words, which show disloyalty to the Constitution of the United States?

Mr. SULLIVAN. I have shown his connection with these subversive organizations.

Senator BORAH. I understand that, but do you have anything from Mr. Frankfurter that can be said to be his personal view?

Mr. SULLIVAN. I do not know by what other name it could be called but his personal view, when he writes an article in the *Current History* for May 1930. Does he not contend that the Supreme Court requires a group of men adequately equipped "to wield the peoples power" and that the Supreme Court is the Constitution as boldly declared by him in the May 1930 issue of *Current History* published by the *New York Times*? Both of those statements were made in that article in May 1930.

Senator NORRIS. Is that Frankfurter that is asking that question?

Mr. SULLIVAN. I am asking that question of the committee, and in the question I invite attention to what Mr. Frankfurter said in that article which I have identified.

Senator NORRIS. One of your objections is that Frankfurter is supposed to have said that the Supreme Court is the Constitution?

Mr. SULLIVAN. That is right.

Senator NORRIS. Do you not know that has been said by many prominent men?

Mr. SULLIVAN. I say a man who says that is unfit for the Supreme Court of the United States, I do not care who he is.

Senator NORRIS. That has been stated by a great many very eminent men.

Mr. SULLIVAN. We have a lot of people in this country who are not qualified to sit on the Supreme Court.

Senator CONNALLY. Do you not construe that to mean that Frankfurter means that the Constitution is what the Supreme Court construes it to be?

Mr. SULLIVAN. That is just what I had in mind.

Senator CONNALLY. He did not say or contend that whatever the Supreme Court wanted to do, the Constitution would have to agree with.

Mr. SULLIVAN. He certainly did. I do not think his article is susceptible of any other interpretation.

Senator BORAH. Then how do you construe the statement of Abraham Lincoln in reference to the Dred Scott decision, in which he said, substantially, that the Constitution of the United States is what the Supreme Court says it is?

Mr. SULLIVAN. I am a great student and admirer of Abraham Lincoln, and I have read most of his writings, but I have not seen anything of that kind by him. Of course, he criticized the Dred Scott decision, as he had a right to do.

Senator BORAH. Yes.

Mr. SULLIVAN. When a decision of the Supreme Court is honestly made, whether it be legal or illegal, it has actual force which must be given effect, and that is the danger involved in putting an unfit man on the Court.

Senator BORAH. When the Supreme Court decides a constitutional question, that is binding until it is reversed, is it not? Do you not contend that when the Supreme Court decides a constitutional question in a certain way, that is binding on you?

Mr. SULLIVAN. Exactly. I also contend that no one should sit on that bench who has views not in accord with the written words of our Constitution.

Senator BORAH. Dr. Frankfurter has never said the Supreme Court could override the Constitution. He has only contended that when it construes the Constitution, that is the Constitution until it is changed, either by amendment or by a reversal of the Supreme Court; that until that is done every loyal American is bound by it.

Mr. SULLIVAN. I cannot interpret his words in that way. I cannot help but distinguish between a person who is the author and one of the prime movers in connection with an unconstitutional proposition; and a group of legislators who do not wake up in time to check what is proposed.

Senator BORAH. A good many things have been said about the A. A. A., but a great many patriotic people voted for it in the belief that it was constitutional. I did not vote for it, and make no argument for myself; but many did believe it was constitutional and necessary. If Dr. Frankfurter had anything to do with it—

Mr. SULLIVAN. I said the N. R. A.

Senator BORAH. Very well, the N. R. A. If Dr. Frankfurter had anything to do with the N. R. A. he undoubtedly acted upon the theory that it was constitutional.

Mr. SULLIVAN. May I make this observation in that connection: In all fairness to the Senate and House of Representatives in connection with the N. R. A. and A. A. A., I do not believe any substantial number of the Members of the Senate or House would have considered any such legislation from any viewpoint except that of emergency legislation to prevent starvation, and to bring order back in place of chaos. So far as I know, Mr. Frankfurter did not treat that as emergency legislation, but treated it as something that was regular and proper.

Senator NORRIS. There is considerable disagreement between people who are equally patriotic and equally able, some of whom thought it should be only temporary and some of whom thought it ought to be permanent. I do not see how that is material, whether he thought it should be permanent or temporary. If I get your theory correctly, Mr. Frankfurter merely agrees with the proposition laid down—and I have never heard it refuted—by the present Chief Justice that the Constitution is what the Supreme Court says it is. Did Mr. Frankfurter argue for that or against it, as you understand it?

Mr. SULLIVAN. He says the Supreme Court is the Constitution.

Senator NORRIS. Is there much difference between that and the statement that the Constitution is what the Supreme Court says it is?

Mr. SULLIVAN. If that were true—

Senator NORRIS (interposing). Is that not true?

Mr. SULLIVAN. I certainly cannot agree that it is.

Senator NORRIS. I concede your right to say that, but I understand the Chief Justice says it is true. Then, according to your theory, we ought to remove him.

Mr. SULLIVAN. Mr. Frankfurter undertook to misquote the Chief Justice, and I think if you will examine what he said you will find it is a garbled quotation.

Senator NORRIS. I have so quoted him many times. I may have been wrong about it. It seems to me that there is nothing wrong with that statement. We may talk about what the Constitution is, but finally the Supreme Court tells what it is, and that is the end of it, until it is reversed by the methods provided in the Constitution.

Mr. SULLIVAN. We do not want to put more judges on the Court to make more rulings like that against the Constitution, because, when made, it is effective. That is a very dangerous thing.

Senator KING. Have you any other statement attributable to Mr. Frankfurter than the one to which you adverted a moment ago, when you were quoting from him or presenting it as a statement of his own? Have you any other statement of Mr. Frankfurter indicating his belief in disloyalty to the Constitution of the United States?

Mr. SULLIVAN. Only that he has been a member of this subversive organization, the American Civil Liberties Union, which membership he has maintained since before 1920, which organization advocates the overthrow of our Government by force and violence.

Senator CONNALLY. I would like to ask you one question: Is it not substantially conceded that there must be some overt act to carry into effect the overthrow of the Government?

Mr. SULLIVAN. Absolutely not. That is a provision which has to do only with criminal trials or conspiracy, the conspiracy being a mental proposition, and the overt act that is sufficient to criminally deal with such a conspiracy is not required to be the use of arms, or

the starting of any violence, but the writing of a letter is a sufficient overt act.

Senator CONNALLY. You cannot make it a crime for them to want to do it.

Mr. SULLIVAN. Not at all.

Senator CONNALLY. But if a person committed such an overt act, then you would prosecute him?

Mr. SULLIVAN. And the advocacy of the use of force and violence for the overthrow of our Government is a sufficient overt act.

#### IV. FRANKFURTER'S APPOINTMENT WOULD WRONG JEWISH AMERICANS

Frankfurter's appointment is being heralded in press propaganda as constituting "a new protest against racial intolerance," when, in truth and in fact, it would very greatly promote racial intolerance by making our other loyal citizens believe that Frankfurter typifies Jewish Americans generally.

Something must be done to protect, against misrepresentation, our loyal Jewish-Americans, who are devoted to the principles of the American Republic, and are always ready to sacrifice their lives—as many of them have frequently done—in defense of our Republic. They are not merely Jews in America, but loyal Americans. Jewish internationalism seeking either special benefits or world domination, has no appeal to them. They do not claim to be homeless. They recognize their homes to be, and also their undivided loyalties, in the American Republic.

Senator NEELY. Your time has expired. If you have anything further to say you may insert it in the record.

Senator McCARRAN. Mr. Chairman, the witness was interrupted a number of times by members of the committee. I suggest that the time be extended to include those interruptions.

Senator NEELY. Without objection it is so ordered. Mr. Sullivan, you may proceed.

Mr. SULLIVAN. A large group of alien-minded Jews however, constantly seeks to make the public believe that all Jews belong to a distinct nationality extending throughout the world, and constitutes "a word community." Louis D. Brandeis has proclaimed in his book "The Jewish Problem—How to Solve It":

Let us all recognize that we Jews are a distinct nationality of which every Jew, whatever his country, his station or shade of belief is necessarily a member (p. 25).

Organize, organize, organize—until every Jew in America must stand up and be counted—counted with us—or prove himself, wittingly or unwittingly, of the few who are against their own people (p. 26).

It is difficult to understand how such views and attitudes can be reconciled with the impartial duties of a member of the Supreme Court! Moreover, in a leaflet, recently issued by the Anti-Defamation League of the Jewish organization B'nai B'rith, and known as Fireside Discussion Group Leaflet No. VII, it is asserted—

Approximately a race, definitely a type, and consciously a unity, we are an historic people—a world community (p. 8).

But that is not the view of the Jewish-American. Rabbi Lazeron came out against such an idea as the building up of that unity in America. He was immediately rebuffed by Rabbi Wise of the Jewish

organization in March 1938, but Lazeron really represented the viewpoint and feeling of Jewish-Americans. That we do not recognize either in office holding or in respect to individual rights.

Senator NEELY. Would it be correct to conclude that your objections to Dr. Frankfurter are based upon the ground that he is a Jew?

Mr. SULLIVAN. Absolutely not. One of my objections to him is that he has not the American mind that other Jewish Americans have, but has that international mind.

The same group of alien-minded, or international, Jews was, obviously, responsible for a so-called world-wide poll of Jewish communities during 1937, with the announced result carried in Associated Press dispatch of September 24, 1937 (published in New York Times of September 25, 1937), that Max Litvinoff, U. S. S. R. Commissar of Foreign Affairs, and Prof. Felix Frankfurter, had been elected to the "Jewish Hall of Fame" among the "120 greatest living Jews" held up as "living ideals" to Jewish youth. Obviously, no American-minded group of Jews or non-Jews could ever have been induced to hold "Red" Litvinoff up as a "living ideal" to any youth. Moreover, the action of a group which so holds up Litvinoff, and also Frankfurter at the same time, should make everyone possessing a grain of intelligence demand to know why Frankfurter did not register some protest, at least in the interest of Jewish youth, if not on his own account. If Litvinoff and Frankfurter belong in the same group, surely neither of them belongs on our Supreme Court.

Surely, no Senator can justify a failure to actively oppose the confirmation of Frankfurter's nomination, which should be indignantly and unanimously rejected.

#### V. CONCLUSION

In conclusion, I merely want to say that on October 20, 1902, I took an oath, as a member of the bar, to "support the Constitution of the United States." I have always regarded this obligation as real and sacred, not merely formal. My appearance before the Senate committee has been pursuant to what I regard as my obligation in such behalf.

I feel sure that many members of the bar throughout the Nation would have taken like action, had it not been for two things (a) failure of the press of the country to acquaint the bar generally with the matters to which I have called attention, and (b) recent press propaganda seeking to convince everyone that it is useless to protest, because it will receive only "routine" consideration, and that confirmation is inevitable. The last-named press propaganda ought to be dealt with as a contempt committed against the Senate of the United States.

Senator BORAH. Is it your contention that Frankfurter is a part of that element which you say is disloyal to the ideals and theories of the Government of the United States?

Mr. SULLIVAN. I say the whole record shows that.

Senator BORAH. I did not ask you that. Have you any statement to that effect from him?

Mr. SULLIVAN. You could not expect a man to make that as a positive statement. You must gather that from what he does.

Senator BORAH. I understood you to say that there were certain statements of his indicating that.

Mr. SULLIVAN. Mr. Frankfurter has not made an express statement, but his record, according to my view, cannot be reconciled with anything else.

Senator McCARRAN. Would you say the expression you quoted from Mr. Justice Brandeis expresses that view?

Mr. SULLIVAN. Most decidedly. In that pamphlet Mr. Justice Brandeis came out with a declaration which I cannot accept in behalf of Jewish-Americans, that persons of Jewish blood feel pride in Karl Marx. No Jew can feel pride in such an enemy to our country as Karl Marx.

Senator NORRIS. You said in the early part of your testimony that in addition to being a lawyer you are a writer. Will you tell the committee what magazines you have written for?

Mr. SULLIVAN. I did not say I had written for any magazines. I have written two booklets. One is entitled "Academic Freedom," and the other "Wolves in Sheep's Clothing." I will be glad to hand them to the committee.

Senator NORRIS. Have you written for any magazines?

Mr. SULLIVAN. Not at all.

Senator NORRIS. Or for any newspapers?

Mr. SULLIVAN. I have never been employed by anybody to write anything. The last booklet was written for a society.

Senator NORRIS. Then you were working for a society. Did you do it without pay?

Mr. SULLIVAN. Yes.

Senator NORRIS. I have read it. I have a copy of it.

Mr. SULLIVAN. They sponsored and published it, and I wrote it at their request.

Senator NORRIS. That expresses your idea?

Mr. SULLIVAN. Exactly.

Senator HUGHES. What was the name of the society?

Mr. SULLIVAN. The Unity Society of Washington, D. C., a Catholic organization.

Senator BORAH. It seems to me you have made very serious statements against Mr. Frankfurter. Have you anything in support of that statement?

Mr. SULLIVAN. I claim that is the only fair deduction from those things to which I have called the attention of the committee.

Senator BORAH. And you have nothing except what you have called to the attention of the committee?

Mr. SULLIVAN. I have not. If what I have called attention to does not support my contention, it is not supported. I have not made any personal charges. I do not know anything about Mr. Frankfurter. I never saw him or talked to him in my life. I am dealing with this matter from certain reports and declarations to which I have invited your attention.

#### STATEMENT OF WADE H. COOPER, WASHINGTON, D. C.

Senator NEELY. Please state your name and address.

Mr. COOPER. Wade H. Cooper, Washington, D. C.

Senator NEELY. For whom do you appear?

Mr. COOPER. I am representing myself.

Senator NEELY. You may proceed.

Mr. COOPER. Mr. Chairman and gentlemen of the committee, while I have been a member of the bar of the Supreme Court of the United States for more than a quarter of a century. I appear here as a citizen, as well as a lawyer, endeavoring as best I can to represent or voice the wishes of the great body of our citizens, the average American citizen, or to make articulate what I conceive to be the wish of the average American citizen.

We have a great Nation and a great cosmopolitan population, in my opinion, it is a wise policy to single out and utilize whenever and wherever we can to fill positions of trust and responsibility the best men that can be found, regardless of what section of the country produces them.

Whether Dr. Frankfurter, the distinguished nominee, ever became a naturalized American citizen or whether his parents were even naturalized I do not know; but if there be no constitutional or legal requirements regarding citizenship, then Dr. Frankfurter, being otherwise qualified, could doubtless render us a great service, similar to that rendered the English people by William the Conqueror, for indeed our need is great. I am sure these questions will all be settled to the satisfaction of the committee before any action is taken.

Whatever else can be said, we are indebted to the city of Vienna and the Kingdom of Austria for sending us or lending us a 12-year-old lad who has developed into one of the most learned men of the Nation, regarded as a great legal genius. Our immediate concern is as to his views of our Constitution and the constitutional rights of our citizens. He is represented as having stated that the "due process" clause in our Constitution is meaningless. I think he should explain what he meant by that statement.

Magna Charta, upon which our Constitution is grounded, in one article or one sentence of 11 words declares: "We will not deny, delay, or sell justice to any man." Standing alone this declaration of the rights of Englishmen might not mean so much, but this declaration was made effective by fortifying it with the necessary means and methods, such as providing for the right of trial by jury and the establishment of the writ of habeas corpus, and such other fortifications as were necessary. And, in this same way, our Constitution and our laws are supposed to have provided the necessary means of making our "due process" cause effective.

Mr. Chairman and gentlemen of the committee, I believe in a free and independent Court, untrammelled, unpacked, and unafraid. I believe that our Supreme Court should be a citadel for the protection of the constitutional rights of the citizen, but instead of that, I am sorry to say that it seems to me that our Supreme Court has become a battering ram for the destruction of the rights of the citizen instead of protecting him; and I say this after considerable reflection and not inconsiderable observation.

The ninth amendment to our Constitution specifically provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Our august Supreme Court is not familiar with this ninth amendment if we are to judge from the manner in which it strikes down and destroys the rights of the people. Let me illustrate.

For nearly 150 years, or ever since the foundation of our Government, our people have had the right, the common law right, to maintain an action against officers and employees of the Government for damages caused by unlawful, wrongful, and fraudulent acts of such officers and employees; but in recent years, for reasons satisfactory to itself in the face of this ninth amendment which I have just read, this august Court has, in effect nullified the ninth amendment by denying the people the right to maintain an action for damages for wrongful and fraudulent acts knowingly committed by officers and employees of the United States.

I would like for Dr. Frankfurter to state whether he approves of the nullification of this ninth amendment by our Supreme Court; and I use the word "our" advisedly, for the people own the Supreme Court and pay for its operation, and that Court should not be allowed to strike down and destroy the rights of the people who maintain and support it, either directly or indirectly.

I do not wish to be misunderstood. The Supreme Court has never yet dared to say in plain English that officers and employees of the United States are not liable for wrongful and fraudulent acts knowingly committed, but the Court resorts to the indirect method of nullifying the rights of the people under the ninth amendment by refusing to grant a writ of certiorari to review the action of the lower court in nullifying the rights of the people. The effect of this refusal to review the action of the lower court is to affirm the action of the lower court. The Supreme Court has said that its refusal to review does not mean that it affirms, but the effect is there just the same in all cases where it has jurisdiction.

Senator McCARRAN. Is the matter which you are discussing now a matter in which you were personally involved?

Mr. COOPER. I am coming to that.

Senator McCARRAN. Do you think the time of the committee should be taken up with such purely personal matters?

Mr. COOPER. No. This is a constitutional question, which I hope the committee will ask Dr. Frankfurter about.

The American people would like, with the permission of the committee, for Dr. Frankfurter to state whether he approves of this indirect method of nullifying their constitutional rights as guaranteed by the ninth amendment.

Senator NEELY. Have you any information concerning his attitude toward this matter?

Mr. COOPER. I do not. I think the committee should ask him about it. When we once get a man on the bench we cannot get him off.

There are a number of such cases in the books as above referred to, but in order to simplify and make plain this horrible situation, which creates or tends to create a bureaucratic despotism from which there is no appeal for the citizen, if the committee will allow me a few moments, I will illustrate in a few words one of a number of experiences I have recently had with our Supreme Court.

Some time ago I sued a number of officers and employees of the United States for \$500,000 damages for wrongfully, unlawfully, fraudulently, and knowingly wrecking and destroying a perfectly sound and solvent savings bank of Washington, D. C.

This bank was always sound and solvent and earned around 40 to 50 percent on its capital. It had built up a large surplus of three or



four hundred thousand dollars and was paying large dividends. I was the majority stockholder and brought suit for damages as above outlined. The defendants demurred and relied chiefly upon the ground that they were officers and employees of the United States and therefore not liable for their wrongful and fraudulent acts.

The lower court, in the first instance, sustained their demurrer and dismissed my case. I therefore appealed to the United States Court of Appeals and that court, after long deliberation, affirmed the action of the lower court, stating, among other things:

Appellant seeks to avoid the effect of the widespread extension of the rule by pointing out that in some of the cases the rule of immunity—as applied to executive officers—was limited to the heads of departments. *Spalding v. Vilas, supra; Brewer v. Mellon, supra*. During recent years, however, a trend is definitely observable extending the application of the rule to minor executive officers—citing *Taselli v. Goff* (2 Cir., 12 Fed. (2d) 396, affirmed 275 U. S. 503), and other cases.

Following this decision by the United States Court of Appeals I collaborated with my attorney, Mr. Richard L. Merrick, in preparing and filing a petition for a writ of certiorari from the Supreme Court of the United States, but that Court, according to custom, promptly denied the prayer of our petition. Thereupon I personally prepared and filed a petition for a rehearing without the knowledge or consent of my attorney, as I did not think it fair to ask him to take the risk of incurring the displeasure of the Court.

I urged the Court to grant the prayer of my petition or state in clear and unequivocal language why the Court refused to grant it as this was a matter not only of interest to me but to the entire country as well. I set up six different grounds for the granting of the prayer of my petition, all of which are shown in the printed copy of the petition, a copy of which I have here and will ask that it be made a part of the statement. The Court very promptly declined to grant the prayer of my petition.

I showed the Court that from 1804 down to 1912 the Court had held that officers of the United States are personally liable for their wrongful and fraudulent acts, citing the case of *Philadelphia Co. v. Stimson, Secretary of War*, volume 223, pages 619-620, in the year 1912, wherein the Supreme Court said:

The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights or property they have wrongfully invaded.

I urged the Court in its majestic power, if the law had been changed since 1912, to tell the American people why and when and for what purpose it had been changed. The response of the Court was as silent as the city of the dead.

The protection by the courts of the wrongful and fraudulent acts of these officers and employees of the United States is based upon the theory that they are acting within the scope of their authority and that this protection is necessary in order that the Government may properly function. My reply was and is that it was never intended by the founders of our Government and the framers of our Constitution that our Government should be operated or controlled by an irresponsible bureaucratic despotism from whose acts there is no appeal; that unfaithful high officials are subject to impeachment, and officers and employees of lower rank are subject to dismissal; that the Consti-

tution provided immunity only for Senators and Representatives; and that, therefore, it is clearly an invasion of the constitutional rights of the people to deny them the right to maintain an action for wrongful and fraudulent acts committed by officers and employees of the United States.

Senator NORRIS. Now, Mr. Cooper, do you think it would be proper to bring Mr. Frankfurter here to ascertain his judgment as to whether the Supreme Court was right or wrong in such a case?

Mr. COOPER. I think you should get his opinion. It is not only me, but the whole country.

Senator NORRIS. If we find that he thinks you were right and the Supreme Court was wrong, then your idea would be to confirm him, would it not?

Mr. COOPER. It depends upon your own opinion.

Senator NORRIS. And if he says you were wrong and the Court was right, then we ought to reject him?

Mr. COOPER. If you think they were right, then you probably would confirm him.

I have shown that the Court conceded this right as late as 1912. If this right of action was a constitutional right under the ninth amendment or the tenth amendment, then I respectfully submit that it was a flagrant abuse by the Supreme Court of its power, for the Congress of the United States itself, which is above the Supreme Court, does not have the power to take away the constitutional right of the citizen.

Senator NEELY. If the committee responds to your suggestion, should it not also call before it all other persons who have lost suits in the Supreme Court of the United States—

Mr. COOPER. Oh, no.

Senator NEELY. Just a moment—and in response to their suggestions, ascertain whether Dr. Frankfurter approves the decisions of the Court against them, and, if so, reject his nomination?

Mr. COOPER. Oh, no. I am referring only to constitutional questions. The rights of the people have been frittered away by disregard of the ninth amendment.

Senator NORRIS. Possibly that may be true, but are you not asking us to do what the chairman has suggested, confining it to the Constitution?

Mr. COOPER. He said "any litigant."

Senator NORRIS. You say it is a constitutional question.

Mr. COOPER. Yes.

Senator NORRIS. Do you think he ought to pass on decisions of the Supreme Court?

Mr. COOPER. I think you should inquire what his views are regarding the Constitution.

It will take only about 2 minutes for me to finish. I would like to get my statement in the record, and then you can ask all the questions you please.

My property to the value of around \$500,000 was destroyed by the joint action of the Comptroller of the Currency and the courts. The bank which I have mentioned paid 100 cents on the dollar long ago and still has left about double its capital after a dissipation in expenses of receivership of almost twice its capital. And still it remains closed.

As first I endeavored to save the bank by the injunction process, but the lower courts dismissed my original bill and refused permission to file either an amended bill or a supplemental one. I petitioned the Supreme Court to issue a writ of certiorari, but it was refused. I then sued for damages, and that right has been denied me in the manner and for the reasons above stated.

My only recourse now is to ask the Congress to refer my claim to the Court of Claims or to make an appropriation, restoring my losses caused by these acts of vandalism on the part of the officers and employees of the United States.

I should not close this statement without saying that our Supreme Court has held that the acts of the Comptroller are not subject to review, that you cannot correct his mistakes. Thus the Court has deprived the people of another right which they have enjoyed for about 600 years. On this subject, in the case of the *United States National Bank of Legrand v. Pole* (2 Fed. Supp. 153 (1932) D. C. Oregon), in speaking of the powers of the Comptroller the Court, at page 157, said:

The Court shares the common feeling against administrative action controlled by judicial review, and the thought suggests itself that a bureaucratic development of this type is not helpful, and that the powers granted are too sweeping and imperious.

Not only has our Supreme Court held directly that you cannot review the administrative acts of the Comptroller of the Currency to make every solvent bank in the country utterly insolvent by the imposition of interest in favor of depositors at the prevailing rate of 6 percent. Of course, if a bank can pay interest it is not insolvent, but the Comptroller can and does render a solvent bank insolvent by the imposition of interest at the rate of 6 percent on the principal. This enables the Comptroller to wreck and destroy any bank in the United States if he so wills it, as he has done in my case.

Senator NORRIS. You said you are a lawyer admitted to practice before the Supreme Court?

Mr. COOPER. Yes.

Senator NORRIS. Have you ever been engaged in the general practice?

Mr. COOPER. No.

Senator NORRIS. You have not tried any cases in the Supreme Court?

Mr. COOPER. Except my own.

Senator NORRIS. You have been in the banking business?

Mr. COOPER. Yes.

Senator NORRIS. Do you suppose that you are influenced somewhat by your prejudice?

Mr. COOPER. I am talking for the Supreme Court.

Senator NORRIS. I know you are. As a matter of fact, a number of banks have had a somewhat similar experience. Do you suppose you may be influenced by your unfortunate litigation? May it have given you a prejudiced view?

Mr. COOPER. He closed a lot of banks besides mine that were solvent, but they were helpless on account of that ruling.

Senator NORRIS. Your bank was closed?

Mr. COOPER. Yes.

Senator NORRIS. And it is still closed?

Mr. COOPER. Yes; after having 100 percent, and it is still solvent. Senator NORRIS. Now you want us to go into the justice or injustice of the closing of your bank?

Mr. COOPER. No. I am only presenting the constitutional question.

Senator NORRIS. Professor Frankfurter had nothing to do with it.

Mr. COOPER. No.

Senator NORRIS. Do you know what he thinks about it?

Mr. COOPER. I do not, but if we continue to put people on the bench who will continue to wipe out the rights of the people, where will it ever end? It is a constitutional question. They have already destroyed my bank.

Senator NEELY. It seems to me that your position is that we should ascertain before we vote for the confirmation of Dr. Frankfurter, how he would have decided your case. This the committee should not and cannot do.

Mr. COOPER. I do not say it should. I am not asking that. I am only asking you to get his view on constitutional questions which are momentous.

Senator NEELY. During your entire discussion you have not given the committee a scintilla of information concerning Professor Frankfurter's qualifications.

Mr. COOPER. No.

Senator NEELY. Or his disqualifications.

Mr. COOPER. I want to know what his thought is about these constitutional questions.

Senator NEELY. And what the committee at the moment wants from you, is information concerning his qualifications for membership on the Supreme Court of the United States.

Mr. COOPER. He seems to have fine qualifications. I am wondering what the committee would discuss, unless it discussed constitutional questions.

I have a few words more.

Senator NEELY. You may proceed.

Mr. COOPER. Interest was looked upon with anathema by both the clergy and the people as early as the ninth century during the time of King Alfred, and not until around the fifteenth century was interest legalized. Interest is not supposed to be paid when the property is in custodia legis, especially when there is no agreement to pay it under that condition. But our Supreme Court has said that the stockholder in a national bank can be assessed for 100 percent and then for interest if necessary, though the property is in custodia legis, and though the stockholder never made such an agreement when he became a stockholder.

All these questions are momentous and vital to all our people. I hope this committee will get an expression from Dr. Frankfurter as to his views on the constitutional questions presented as well as his views upon such other questions as may suggest themselves to the members of the committee.

I wish to thank the members of the committee, and I shall be glad to answer any question that I can.

Senator NEELY. The subcommittee will now adjourn until 10 o'clock tomorrow morning.

(Whereupon, at 12 noon, the committee adjourned until the following day, Wednesday, January 11, 1939, at 10 a. m.)

## NOMINATION OF FELIX FRANKFURTER

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WEDNESDAY, JANUARY 11, 1939

UNITED STATES SENATE,  
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D. C.*

The committee met, pursuant to adjournment, in room 357, Senate Office Building, at 10 a. m., Senator M. M. Neely (chairman) presiding.

Present: Senators Neely (chairman), McCarran, Connally, Hughes, Borah, Norris, Austin, and Danaher.

### STATEMENT OF MRS. ELIZABETH DILLING

Senator NEELY. Please state your name.

Mrs. DILLING. Elizabeth Dilling.

Senator NEELY. For whom do you appear?

Mrs. DILLING. I appear as an American citizen who devotes her time to noncommunistic activities at my own expense.

Senator NEELY. You may proceed.

Mrs. DILLING. In my belief, the fate of our Nation now rests largely in the hands of those sound legislators of the Democratic Party who will place their allegiance to American principles first and ahead of loyalty to party label or control, and who will thus prevent their party from being further discredited by their enforced support of communistic legislation and appointments.

I come before the Senate committee to protest the appointment of Felix Frankfurter to the Supreme Court Bench as an American citizen who has devoted over 7 years of time and thousands of dollars of my own money to studying and opposing the open and camouflaged "red" propaganda aimed at undermining our form of government.

I am the author of a book *The Red Network*, published in 1934 at my own expense, which is recommended by the Army and Navy Register, the American Coalition of Patriotic Societies, the National Sojourners, a society for Army and Navy officers; by the national Americanism chairman of the American Legion, past and present, and countless patriotic leaders. Not only has not one fact in *The Red Network* never been disproved by anyone, but in the only court case in which *The Red Network* has ever figured, it was used as a basis for barring the American Civil Liberties Union, of which Felix Frankfurter is and has long been a leader and national committeeman, from using the public school auditorium in San Diego. After representatives of the national committee of the American Civil Liberties Union, in nearly a month in court, were unable to discredit a

line of The Red Network, it was admitted by the judge in evidence and the American Civil Liberties Union was barred from use of the public school auditorium as a "seditious organization."

Senator NEELY. By what court?

Mrs. DILLING. I will give you that. I will give you the number of the case and the court.

That was case No. 70805, department 6, of the Superior Court of San Diego, Calif., Judge Arthur L. Mundo. The case was probably the most outstanding in the history of proceedings filed by the Civil Liberties Union on the Pacific coast, they stated in their Los Angeles bulletin, The Open Forum, March 10, 1935, issue, which I have with me.

I am submitting to you a photostatic copy of the original letter, which I have with me, received from the deputy district attorney who prosecuted this case, and also a copy of the court testimony of Harry Elmer Barnes of the national committee of the American Civil Liberties Union, in which he twice admitted on the stand that he had found "no error of fact" in The Red Network, but said, "I do not like her."

Four thousand copies of my next book, The Roosevelt Red Record and Its Background, issued in August 1936, at my own expense, were purchased for distribution by Jeffersonian Democrats, but the book was not favored by the Republican Party because of my inclusion of the radical activities of certain Republicans. My work is based neither on political motives nor personal antagonisms. The rank and file of both major parties, I believe, are sound patriotic Americans. It is only a minority.

I first propose to substantiate with documentary evidence my conclusion that Felix Frankfurter has long been one of the principal aids to the "red" revolutionary movement in the United States; that he has, regardless of fee, worked in conjunction with and in behalf of leading "red" revolutionaries, and published propaganda for them, working directly with the Communist Party.

Second, I propose to cite such experts as Dean John H. Wigmore, the accepted authority on legal evidence, whose textbooks are used in American law schools, to the effect that because Felix Frankfurter's prejudice in favor of radicals, that he is unqualified not only for the Supreme Court bench but as a lawyer.

Senator McCARRAN. Where did you get that document?

Mrs. DILLING. I am giving you their own photostatic copy of the article, and I will give you a few excerpts from it.

Senator McCARRAN. May I interrupt you?

Mrs. DILLING. That is all right.

Senator McCARRAN. I do not want to disturb your train of thought, but I should like to ask you a question at this point.

Mrs. DILLING. That is all right.

Senator McCARRAN. Will you kindly tell the committee how Mr. Frankfurter came to be connected with the *Sacco-Vanzetti* case?

Mrs. DILLING. Of course, he would be the one to tell you that. He was a member of a Communist-aiding group, along with William Z. Foster and Scott Nearing, and others. They carried on the same propaganda you will find in all such organizations.

Senator McCARRAN. Was he appointed by anyone in authority?

Mrs. DILLING. I suppose he appointed himself. The American Civil Liberties Union would be represented and take an active part in anything of that kind. I will show you some of their pamphlets. Those men represented the Communist Party. It was a communistic agitation.

Senator McCARRAN. He was not attorney for either side, was he?

Mrs. DILLING. No; I believe not; but he did the propaganda work for them. If you will read those letters and those pamphlets you will see the kind of propaganda work they were doing.

Senator McCARRAN. Did he enter his appearance in the case as a friend of the court?

Mrs. DILLING. I don't know whether he was a friend of the court or not. He may have been a friend of the court, but I would not know about that.

I am presenting a photostatic copy of an article published in the Boston Transcript, April 26, 1927, headed "J. H. Wigmore Answers Frankfurter Attack on Sacco-Vanzetti Verdict." Dean Wigmore takes up one charge after another made by Frankfurter and refutes it. He terminates the article by saying:

And finally, why should he, in that popular article, make errors and mis-statements which, if discovered in a brief of counsel filed in the case, would qualify him for proceedings for disbarment?

The article on the Sacco-Vanzetti verdict by Frankfurter appeared in the March 1927 issue of Atlantic Monthly. Dean Wigmore's reply first takes up Frankfurter's claim that, to quote—

the jury was specially selected by the sheriff's deputies. \* \* \* We are told again that the jury was "picked for its respectability." And the reader would thus never know that, in fact, a panel of about 675 jurors was examined, and by the trial judge himself, before the 12 were found. Nor that counsel for defense accepted all of them as satisfactory. \* \* \* So that the insinuation of a "picked" jury was baseless, and worthy only of unscrupulous yellow journalism.

I am quoting Wigmore.

In the next point Dean Wigmore quotes from the evidence and shows that Frankfurter's charge of misrepresentation against the trial judge is instead Frankfurter's misrepresentation and "a libel on the worthy trial judge in that it charges him with knowing falsity in an official statement."

Concerning the defendants, Sacco and Vanzetti, to quote Dean Wigmore:

An important part of the prosecution's case was the copious lies (admittedly) told by the accused on their arrest—lies about their weapons and their whereabouts. Those lies, betraying their consciousness of guilt, were explained by the accused as due to the supposition that they were being arrested preliminary to deportation as alien "reds," and to their fear of being deported to Italy. Several minor circumstances discounted the truth of this explanation; but the main and convincing one, as against Sacco's explanation, was that he had obtained and carried in his pocket at the very moment of arrest on May 5, 1920, a passport upon which he and his family intended to sail for Italy 2 days later.

Dean Wigmore says that all of Frankfurter's—

palaver seeking to make the reader believe that the judge and prosecutor thrust the defendants "redism" into the case, and then illegally and unfairly exploited it—all this palaver is a consummate misrepresentation. The facts were that not a word was offered on the subject in the case in chief; that defendants' counsel themselves insisted on bringing in those facts in defense as the only hope of overcoming the effect of the case in chief \* \* \* counsel for the

defendants stated to the court that all of the counsel were agreed that it was necessary to go into the subject of radicalism in order to meet the Commonwealth's claim of consciousness of guilt—

**Due to their admitted lies—saying that—**

"They (the defendants) had to give a reason why they did those things. If they had said nothing they would have been convicted out of hand." It was fatal to the accused, on the homicide evidence. If they had not voluntarily disclosed their "redism," and so they voluntarily did so, after full consideration by their counsel. \* \* \* So what becomes of the (Frankfurter) assertions that the prosecutor made a "deliberate attempt to excite the emotions of jurors" by the "red" testimony, and of his insinuations that the Judge illegally "connived" at making radicalism the dominant issue? "Those assertions are a gross libel and a cruel falsity," says Wigmore, "and they stamp the whole article as unworthy of credit; for they are the main tests of its complaint."

One misrepresentation after another is exposed by Dean Wigmore who then takes up B. The International Aspect. He says that Frankfurter's article began by attributing to this *Sacco-Vanzetti case* an "international concern," to which Dean Wigmore replies:

Yes, indeed. But he fails to tell us the reason it has aroused such an interest. Another "suppressio veri"; for the reason is a sinister one and that reason is that the two accused appear to be valued members of a powerful international fraternity or cabal or gang who have, since the trial and conviction, sought to give aid to their convicted associates by the most extensive system of international terrorism that the world has known for a century past.

Ever since the trial in 1921, this terrorism has been carried on. If it had succeeded, justice in the United States would be at its mercy. \* \* \* Propaganda pamphlets were first distributed in France, Italy, Spain, England, Russia, Japan, Central and South America; and the bomb-throwing began at American embassies and consulates. In 1921 a bomb was thrown at Ambassador Herrick in Paris and injured his valet. A bomb was placed in the American consulate in Lisbon and exploded after the consul kicked it away. Threats of death were made to American consuls in Peru, France, and Cuba. Four continents were dotted with these incidents. Threats of violence were made against officials connected with this trial and the home of Judge Thayer has been almost continuously under special guard. Eight persons in all were injured by these acts of terrorism.

A column of these incidents are cited. Then he says:

And this insensate resort to violence is invoked in a case which has been misrepresented, by the cabal, all over the world, as a case of persecution for radicalism. The dangerous thing to American justice is that the local representatives, by pressing a button, can set this international force in motion to secure immunity for any one of its members who is charged with any serious crime.

I am presenting you with a photostatic copy of an article in the Boston Transcript of June 28, 1932, to quote:

The drive against the appointment by Governor Ely of Prof. Felix Frankfurter of the Harvard Law School to the supreme judicial court grew by leaps and bounds today, centered principally in the appeals to members of the executive council to refuse confirmation. Councillors have been literally deluged by a flood of mail on the subject, in which the protests against the appointment greatly outweighs comment of a favorable nature.

In reference to the *Sacco-Vanzetti case* is the following:

"I am entirely familiar with the activities of Mr. Frankfurter in this case," said Mr. Keith, "as during the years 1923 and 1924 I was deputy district attorney in the southwestern district under Harold P. Williams, and my activities in the office were in large part concerned with this case. I then believed, and still believe, that Frankfurter and men of his type are a menace to this country and to American institutions. His work, which he published on this case, in many respects misrepresented the evidence entirely, and he took an extremely partisan and unjustifiable position at a time when he assumed to be acting in a somewhat judicial capacity."



Another article on Frankfurter's appointment states:

Set a thief to catch a thief, is not considered to be a good rule in selecting men for positions as policemen. \* \* \* A defender of speakeasies and bootleggers would manifestly be unfit for service as an officer to enforce the liquor laws. A general commanding an army would never choose for a member of his staff an officer known to be in sympathy with the enemy. A man who has been a defender and advocate of anarchists, who conspired to overthrow our country by force, is unfit for appointment to any position of authority under the law.

I am also presenting to you a photostatic copy of a full-page report in the Public Ledger, Philadelphia, August 7, 1927, of a committee of three appointed by Governor Fuller to conduct an independent investigation of the Sacco-Vanzetti trial. The report is headlined "Report of Committee of Three Find Sacco and Vanzetti Fairly Tried and Guilty of Murder."

I am presenting to you a photostatic copy of the advertisement of the book *The Letters of Sacco and Vanzetti*, edited by Frankfurter's wife, Marion Denman Frankfurter, and the Communist supporter, Gardner Jackson, with the statement on it: "This volume is sponsored by the following international committee." Ten radicals are listed, including Communist Theodore Dreiser; Maxim Gorki, of Russia, a Communist Party author; and Romain Rolland, Communist leader in France and on the board of the International Union of Revolutionary Writers, with headquarters in Moscow.

Anything you want after I get through, I can give to you.

I could spend a week with you and prove every point I make, because I have the evidence.

I am presenting to you also a photostatic copy of the New York Times Book Review of July 10, 1932, concerning the book *Mr. Justice Brandies*, edited by Felix Frankfurter. One section is by Felix Frankfurter, another by Donald Richberg, and another by Max Lerner. Donald Richberg's socialistic activities are cited in my books. I am submitting a photostatic copy of a leaflet announcing Max Lerner as national organizer, Workers' Party, as speaker, Sunday, May 13, 1923, at Union Hall, Russellton, Pa. (The Communist Party was then called the Workers' Party of America.) In addition I have with me original Communist Party vouchers listing sums paid to Max Lerner for lectures for the party and original letters written from the Communist Party to Max Lerner giving him his orders. This is illustrative of the affiliations and close associations of Felix Frankfurter. Max Lerner, now professor at Williams College, is also actively connected with the American Student Union, which was formed by a coalition of the Communist and Socialist Parties' youth organizations.

I am submitting a photostatic copy of a letter sent by Communist Party national headquarters to a district organizer of the party, saying in part:

Under another cover we are today sending you 100 copies of the Sacco-Vanzetti defense pamphlet for sale at the Coldwell meeting.

I am also offering you a photostatic copy of a letter sent out by William Weinstone as assistant executive secretary of the Communist Party, which reveals the close association of Roger Baldwin, as national director of the American Civil Liberties Union, and Felix Frankfurter, with the Communist Party. I am going to quote from it.

The letter takes up with the district organizer the matter of flight, ing for the right of the Communists to carry on their party activities. Roger Baldwin's advice is cited throughout. It was thought advisable to have the American Liberties Union act for the party instead of the party organizer or members as they might be arrested and jailed, while the Civil Liberties Union representatives would not, and the letter says Baldwin "suggested the attorney by the name of Stambaugh that had been recommended by Felix Frankfurter, the prominent Liberal of Harvard University." As Baldwin stated in the Survey Graphic of August, 1927:

The Communists do not find it possible under party auspices alone to reach a wide enough public. When they tackle a job with more than a class or party appeal, they cover up their guidance with a respectable front of nonpartisan professors, writers, lawyers, and publicists.

I am presenting you with a photostatic copy of clippings from the New York World and New York Times (April 27 and April 30, 1927) concerning the bloody Passaic, N. J., textile strike which was led by Communist Albert Weisbord, and called by the Communists a "first lesson in revolution." To quote the New York World report:

Prof. Felix Frankfurter, of Harvard, under whom Weisbord was a student, is among counsel for the strike leader, but did not appear in person, sending a brief instead. He held the injunction violated constitutional rights.

Frankfurter's letter appearing in the New York Times states that he gave his advice "and without retainer to counsel of the strikers." His heart was in the work.

That Felix Frankfurter worked closely with the self-avowed "red" revolutionary Roger Baldwin, even when he was in the War Office, is shown by the evidence on page 1087 of the report of the New York State Legislative Committee Investigating Seditious Activities known as the Lusk Report. A letter from Baldwin to Manley O. Hudson is cited in which Baldwin says: Lippmann and Frankfurter are of course out of that particular job now" (War Office). "And I have to depend entirely upon Keppel."

Baldwin's letter to Louis P. Lochner, on page 1088 of the same report, shows the camouflage of flags and patriotism which he jeeringly recommends as necessary to put over their "red" propaganda.

The history of the American Civil Liberties Union is the history of the entire Communist and "red" revolutionary movement. I have practically all of the yearly reports of the American Civil Liberties Union with me and can, if the committee wishes, show in connection with Communist literature that the American Civil Liberties Union has not only fought in behalf of the principal Communist cases of sedition and crime but has donated funds and loans to the Communist Party, I. W. W., and other "red" organizations and received along with the I. W. W.'s Communists and Anarchists, thousands of dollars from the "red" American fund for public service, commonly known as the Garland fund because Charles Garland, a radical, who served a term in prison for running "a free-love farm," established the fund with inherited money to be used only for radical purposes.

I also have a number of American Civil Liberties Union pamphlets with me. For example, bill S. 2268 "To punish for exerting mutinous influence upon Army and Navy," was aimed at curbing seditious Communist Party activities in our armed forces. No decent law-

abiding American, not intent upon overthrowing the Government could possibly object to the provisions of this bill. It was called the "Incitement to disaffection" bill. Characteristically, the American Civil Liberties Union issued a pamphlet December 1935, entitled "Beat the 'Incitement to Disaffection' bill!"

A full and detailed review of the cases fought by the American Civil Liberties Union shows that practically all of them were fought to aid some phase of the revolutionary movement, and that there were few cases which were not fought for the purpose of keeping the way open for Communist propaganda.

I am presenting you in this connection with a photostatic copy of the cover of the Communist magazine Soviet Russia Today, September 1934 issue, and the article on page 11 of it, by Roger N. Baldwin, as director of the American Civil Liberties Union. It is entitled "Freedom." He starts by saying:

Those of us who champion civil liberties in the United States and who at the same time support the proletarian dictatorship of the Soviet Union are charged with inconsistency and insincerity. "How can you consistently support the right of free agitation in capitalist countries when you defend a dictatorship that tolerates no agitation against its rule?" we are asked. \* \* \* I, too, take a class position. It is anticapitalist and prerovolutionary \* \* \* I champion civil liberty as the best of the nonviolent means of building the power on which workers' rule must be based. If I aid the reactionaries to get free speech now and then, if I go outside the class struggle to fight against censorship, it is only because those liberties help to create a more hospitable atmosphere for working-class liberties. The class struggle is the central conflict of the world; all others are incidental. When that power of the working class is once achieved, as it has been only in the Soviet Union, I am for maintaining it by any means whatever. Dictatorship is the obvious means in a world of enemies. \* \* \*

Senator NEELY. Have you any evidence that Dr. Frankfurter participated in the preparation of that article or that he ever approved it in any way.

Mrs. DILLING. Roger Baldwin has never done anything but that kind of stuff, and he is a director, and Frankfurter is a national committeeman. They have worked together for the last 19 years. He couldn't be ignorant of anything of that kind. That has been printed over and over again. If you will take one of the catalogs of the American Civil Liberties Union and go through it, you will see what they are doing.

Senator NEELY. Do you hold Professor Frankfurter responsible for that article simply because he was a member of the national committee and Baldwin was a director of the Civil Liberties Union?

Mrs. DILLING. That is right.

Senator NEELY. Suppose you and I were members of the Republican or Democratic Party and some other member of our party should commit a crime. Should you and I be held responsible for it?

Mrs. DILLING. I wouldn't serve under a dictator or advocate dictatorship, or work for the "red" revolution, if I didn't want it. I would not be tied up with a man like that.

Senator NEELY. Are you a member of a political party?

Mrs. DILLING. I am not a member of either one. I like them both.

Senator NEELY. You are not a member of any political party?

Mrs. DILLING. No. Perhaps I should be more politically minded. I want the two-party system.

Senator NEELY. If you were a member of a political party, and some of its members were convicted of murder, would you feel that you were responsible?

Mrs. DILLING. That is not relevant to this. This man is a member of the organization which he serves. It is a propaganda organization. These men take part in the entire legal activities of the organization, in which Frankfurter is a member, and he couldn't be blind to its purposes. He actually took part in that case.

Senator NEELY. If you were a director of a bank and the cashier should default, without your knowledge, would you feel that you were as guilty as he?

Mrs. DILLING. Not at all; but if I defended him in court and said it was all right and proper, then I would be just as guilty as he was.

Senator NORRIS. Do you think that Dr. Frankfurter has ever defended any man by saying that what he was accused of doing was the proper thing to do?

Mrs. DILLING. Sacco and Vanzetti were murderers with long records.

Senator NORRIS. There is no doubt that there is and was a divided sentiment as to whether they were guilty or not. Have you any evidence that Dr. Frankfurter ever claimed that what they were accused of doing was the proper thing to do?

Mrs. DILLING. I can read that record to you, and you can see what he said.

Senator NORRIS. You do not mean to say, do you, that anybody insisting on a trial could necessarily be charged with saying that the crime alleged was the proper thing to do?

Mrs. DILLING. That really is not the issue.

Senator NORRIS. I do not think it is, and I am wondering how or why you are bringing it up.

Mrs. DILLING. Frankfurter was a member of that organization, and he defended those men, and he knew they were guilty of every kind of crime done by "reds," and they were against our form of government.

Senator NORRIS. I have read your book *The Red Network*, and I note that you have classified as "reds" some of the most prominent people in the United States.

Mrs. DILLING. I will be glad to go into that. If you want to go into your record, I will be glad to do it.

Senator NORRIS. I would like to have all that brought out. You classify as "reds" practically this entire committee.

Mrs. DILLING. I can go into the origin of your activities in the whole T. V. A. proposition.

Senator NORRIS. I would be very glad to do that.

Mrs. DILLING. I could spend a good deal of time on those things. I am not saying anything against you personally, but I don't like your policies.

Senator NORRIS. Do you think I am guilty of the Sacco-Vanzetti murder?

Mrs. DILLING. Did I charge you with that?

Senator NORRIS. No; but you have charged Frankfurter with it, practically. You practically said he believed in that kind of murder.

Mrs. DILLING. If you will let me finish this statement, I will be glad to go over any of this with you all day. I think it would be

better to go on with what Frankfurter has done and not take up the time.

Senator NORRIS. That is what I have been thinking all the time.

Mrs. DILLING. I don't know why you brought in your own record.

Senator CONNALLY. You do not think that Senator Norris had anything to do with these matters you are discussing?

Mrs. DILLING. I do not.

Senator CONNALLY. Then do not bring him into it.

Mrs. DILLING. Thank you. I will be glad to follow your instructions. I am just showing you the kind of people Mr. Frankfurter was working in conjunction with.

The American Civil Liberties Union pamphlet issued October 1934, entitled "Shall We Defend Free Speech for Nazis in America?" states:

The Union makes no special issue of defense of Nazis. Instances of denial of their rights are few. The time we put on it is slight \* \* \*. Is it not clear that free speech, as a practical tactic, not only as an abstract principle, demands defense of the rights of all who are attacked in order to obtain the rights of any? In other words, the best tactics for defending the rights of Communists, for example, are to defend the rights of Nazis.

These very people that are criticizing me instead of suing me for what I have said, they offered to help me. They really offered to help me. Isn't that wonderful? They would like to cut my throat.

Typical pamphlets issued by the American Civil Liberties Union are entitled "Beat the Kramer Sedition Bill," "Sedition in Illinois," "The Gag on Teaching." The latter opposes Bible reading in schools; so-called compulsory patriotism, such as the display of flags, singing of patriotic songs, memorizing the Constitution and Declaration of Independence. They uphold and carry on legal fights in behalf of teachers and students who are ejected for "red" activities. The American Civil Liberties Union fought the case of the Atheist Freethinkers Society to bar Bible reading from the New York public schools.

Another pamphlet is entitled "The Attempted Deportation of John Strachey," issued May 1935. They are now fighting for the admission of Communist John Strachey to the U. S. A. The Communist Party's Daily Worker reported that the reading of Strachey's "Coming Struggle for Power" converted one railroad worker so that he joined the Communist Party and recruited for the cause.

When the congressional committee, headed by Congressman Fish, commissioned to investigate subversive activities, recommended laws to curb Communists, the American Civil Liberties Union issued a leaflet January 1931 entitled "Call to Action—Help Beat the Fish Committee's Program." And the program was beaten. In May 1932 they issued another pamphlet entitled "Still the Fish Committee Nonsense," with advice on how to "offset any use of the report" of the Fish committee.

I submit a photostatic copy of a leaflet announcing a mass meeting for September 14, 1930, sponsored by the American Association for the Advancement of Atheism, the American Civil Liberties Union, and the Communist Party's International Labor Defense. Communism advocates militant atheism and the destruction of the family

unit as "capitalistic" and free sex relations. The American Civil Liberties Union fought the case of the Communist Party organizer, Anthony Bimba, accused of blasphemy in 1926. I submit a photostatic copy of a clipping (February 11, 1926), citing that Attorney Harry Hoffman, of the Communist Party's International Labor Defense, was counsel for Bimba, and concerning the legal procedure, to quote:

He said that before deciding he wanted to confer with Roger Baldwin, of New York, leader of the Civil Liberties Union; Prof. Felix Frankfurter, of the Harvard School of Law; Lawrence G. Brooks and other prominent in the Free Speech League and the Workers' Party of America.

The American Civil Liberties Union issued in May 1927, a book called *Professional Patriots*, which denounced all the anti-Communist societies, including the United States Flag Association, Allied Patriotic Societies, and so forth, and stated "what puts them all into the same discussion is that they all participate in the attempt to make of a noble word and emotion the hand maid of greed and cowardice," and that they "degrade the name of patriotism to the service of the dollar." The "Constitution worship" fostered by the American Legion and Security League is sarcastically referred to. This book ran serially in the Communist Party's *Daily Worker* as Communist propaganda in June 1927. It was endorsed by Felix Frankfurter. His endorsement appears on page 6 of the introduction of the book.

Frankfurter's endorsement of the Communist-controlled loyalist government of Spain appears on page 25 of a booklet entitled "Writers Take Sides," issued by the communistic League of American Writers, in May 1938.

There is a reason why every Governor of California for the last 22 years has refused to pardon Mooney; and that reason is, the overwhelming evidence of his guilt prevented it until the radicals were able to elect their own man, Governor Olson, pledged to free Mooney.

Like the *Sacco-Vanzetti case*, the *Mooney case* has been used for world-wide ballyhoo.

Mooney's letter to Stalin, which is printed on the front page of the *Communist Labor Defender* magazine for November 1932, thanks Stalin—

for the magnificent spirit of international working-class solidarity by the militant workers of Russia in defense of my fight for freedom, and for the freedom of all class-war and political prisoners. Were it not for the revolutionary workers of Petrograd, led by our beloved Comrade Lenin, in militant demonstrations before the American Embassy on April 25, 1917, I would not now be addressing these greetings to you. Thus my life was saved and my usefulness to the revolutionary working class prolonged. It is my hope that these revolutionary greetings to you, and through you to the toilers of the Soviet Union, will be presented to you in person on the fifteenth anniversary of the Russian revolution by my dear 84-year-old mother, who will be in Moscow on November 7, 1932, in the continued interest of the working-class fight for my freedom from the dungeons of American capitalist imperialism. All hail to the Russian revolution and the dictatorship of the proletariat. I'm for it hook, line, and sinker, without equivocation or reservation. Please accept my warm personal regards and best wishes. I am, comradely yours, Tom Mooney, 31021.

I have a photostatic copy of a letter written by Tom Mooney threatening the Governor of Utah with violence unless he freed a fellow revolutionary, Joseph Hillstrom.

In a letter reproduced in the *Daily Worker*, September 12, 1938, the secretary of the Socialist Party is quoted as saying:

Tom Mooney was expelled from the English-speaking branch of the Socialist Party of San Francisco in 1913 for the very same thing for which he is now in jail, for the advocacy of dynamiting. He later joined the Hungarian branch. In spite of this, the Socialist Party has and will struggle for the release of Mooney.

I have with me a copy of the report of Governor Rolph, of California, giving reasons for denying Mooney's application for pardon. Among them is Mooney's letter to Mother Jones concerning the dynamiting of Sacramento power lines, a photo of his dynamite and dynamiting tools, his connection with Anarchist Beckman, with whom he launched the Anarchist paper, the *Blast*, which advocated arson and assassination before the Preparedness Day parade crime, when a suitcase of dynamite with a time clock was set about a half hour before the blast, killing 10 and injuring 40 or 50 persons. To Hell With the Government was the caption in the *Blast* when the paper was denied mailing rights by Federal authorities. Mooney's career was as an agitator not as a labor man.

On page 73 of Governor Rolph's report, denunciation of President Wilson's Mediation Commission in the *Mooney case*, of which Felix Frankfurter was counsel, appears, stating:

The report made by the Commission was bristling with falsehoods and added great strength to the Mooney propaganda.

Col. Theodore Roosevelt's scathing letter to Felix Frankfurter concerning his defense of Tom Mooney is often quoted but seldom given in full. It is a powerful and convincing letter, in which Colonel Roosevelt says to Frankfurter, among other things:

Here again you are engaged in excusing men precisely like the Bolsheviks in Russia, who are murderers and encouragers of murder, who are traitors, to their allies, to democracy, and to civilization, as well as to the United States, and whose acts are nevertheless apologized for on grounds, my dear Mr. Frankfurter, substantially like those which you allege.

The American Civil Liberties Union formed a special national Mooney-Billings committee and spent thousands of dollars for propaganda in behalf of this "red" revolutionary.

Senator CONNALLY. The letter from former President Roosevelt is already in the record. I do not think you should repeat it.

Mrs. DILLING. I am not going to repeat it.

Senator CONNALLY. Will you please let us conduct the hearing?

Mrs. DILLING. Certainly. I am not giving you the letter. I am just referring to it.

The Report of the Illegal Practices of the United States Department of Justice was issued May 27, 1920, by Judson King, of the radical National Popular Government League, and signed by 12 lawyers, 1 of whom was Felix Frankfurter. This report was a bitter and untruthful attack upon the Department of Justice, charging wholesale arrests of "reds" without warrants, cruelty of prisoners, forgery by agents to make out cases against "innocent reds," refusal to let prisoners communicate with friends, and so forth, and so forth.

Senator NORRIS. Do you have a copy of that letter?

Mrs. DILLING. No; but I can get it for you.

Senator NORRIS. I think that letter should go into the record, with the names of the lawyers who signed it.

Mrs. DILLING. They are all published in my book.

Senator NORRIS. Your book is not in the record—not yet.

Mrs. DILLING. I will give you the records of all 12 of them, if you want to go into it.

Senator NORRIS. I think their names at least should go in the record.

Mrs. DILLING. We are handling Frankfurter right now.

Senator NORRIS. All the names and the letter itself should go in the record.

Mrs. DILLING. All right.

Senator McCARRAN. Do you have that letter?

Mrs. DILLING. No; but I can get it for you.

Senator McCARRAN. Is it available?

Mrs. DILLING. Yes.

Senator McCARRAN. Will you get it and present it to the clerk of the committee?

Mrs. DILLING. Yes.

In reply, Attorney General Palmer sent a telegram to the Popular Government League signers, saying:

Some of the aliens themselves have since denied the very statements which your committee filed. Your apparent willingness to believe these statements made by alien anarchists when facing deportation in preference to the testimony of sworn officials of the Government, whose only motive is the performance of duty, indicates some other desire on your part than just administration of the law.

The New York Times, June 2, 1920, quoted Palmer as saying of the lawyer-signers:

We find several of them appearing as counsel for Communist and Communist Labor Party members at deportation hearings. I have difficulty in reconciling their attitude with that of men sworn to uphold the Constitution of the United States.

When the Russian-American Industrial Corporation was launched by the Russian-born "red," Sidney Hillman, for the purpose of aiding the "economic rehabilitation" of Russia, according to the leaflet issued by them, it was backed by Lenin and the Soviet Commissars Telichevin, Rykoff, etc., by revolutionary Eugene V. Debs and by Felix Frankfurter. The Russian-American Industrial Corporation also launched a campaign with the Communist Friends of Soviet Russia to raise money for "starving children in Russia," although Commissar Litvinoff stated at that time there was no famine in Russia. So many Communist funds raised for one purpose are spent for propaganda instead.

Frankfurter's other radical activities extend in many directions and could be taken up in detail.

I submit photostatic copy of the Railway Review for March 3, 1923, reproducing the letterhead of the Workers Education Bureau of America, with Felix Frankfurter's name appearing on it, with this notation beneath it:

The teaching of socialism in the trade-unions of the United States is the special task of the Workers' Education Bureau of America.

Its connection with the pro-Communist New School for Social Research and other "red" groups is reviewed. Felix Frankfurter has



also served on the board of the radical New School for Social Research.

I have here a copy of the Communist Party's Chicago daily newspaper, the Daily Record, of January 6, 1939, eulogizing Frankfurter's "fine record" and printing his picture on the front page in connection with his appointment to the Supreme Court.

I have also a copy of the Communist Party's New York daily newspaper, the Daily Worker, January 6, 1939, with a picture of Frankfurter on the front page and a report showing him as an "outstanding legal liberal whose influence has long been an important factor in New Deal policy making."

I have also a copy of the Communist Daily Record for January 9, 1939, reproducing on the front page the note sent to the Senate by President Roosevelt in which he nominated Felix Frankfurter to the United States Supreme Court. It would be interesting to know how the Communist press secured the use of the President's personal letter to the Senate for reproduction. I have not seen such a reproduction in any other paper. The Communist press confidently announces that confirmation by the Senate is expected.

The propaganda now being put forth is that the President should have the right to appoint members of the Supreme Court as he sees fit. However, the Senate set a precedent in May 1930 when it refused to confirm the appointment of Judge John J. Parker, of North Carolina, to the Supreme Court Bench, voting 41 to 39 against confirmation, principally because, it was argued, this appointment was largely for the purpose of strengthening the Republican Party in the South. How much greater is the issue of patriotism in the Frankfurter appointment than that issue of party factionalism.

The United States Constitution, article III, section 3, states:

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

Since it is clear from his record that the foreign-born Frankfurter has over a period of 19 years, at least, been giving aid and comfort to the enemies of our American form of government, I beseech the Senate of the United States to refuse confirmation of his appointment to the Supreme Court Bench, where he may exert his pernicious influence for life.

That is all, Mr. Chairman.

Senator McCARRAN. Have you any doubt as to Mr. Frankfurter's present membership in the American Civil Liberties Union?

Mrs. DILLING. It is in their report. I don't have that here. I can get it.

Senator McCARRAN. As I understand your statement, you do not say that the American Civil Liberties Union is of itself a communistic organization, but that it is controlled at the present time by a Communist group. Is that true?

Mrs. DILLING. It is an organization to aid draft evaders, and men guilty of seditious activities and who are opposed to our form of government. There is a letterhead with his name on it. I can show that some of these men are members of the Communist Party.

Senator McCARRAN. Will you let me see that letter?

Mrs. DILLING. Yes.

Senator McCARRAN. Whose name did you say is on it?

Mrs. DILLING. Frankfurter's name on the national committee. There is the letterhead with his name on it.

Senator McCARRAN. Let me see it, please.

Mrs. DILLING. Yes, indeed; I will give you a copy of it. It says "Beat this bill." The American Civil Liberties Union wanted to defeat that bill.

Senator McCARRAN. Do you know to whom this letter was addressed?

Mrs. DILLING. I suppose it shows on the letter. It says, "We have got to start a free-speech fight." They wanted to work up the people to make a free-speech fight. Everyone of these letters shows that. They said they were going to have a meeting for W. Z. Foster and go and set up a fight for him, because he had been barred from speaking in Colorado. That is shown in some of their own letters.

Senator McCARRAN. This letter to which you have referred is not in the record.

Mrs. DILLING. It is for you gentlemen to decide that.

Senator McCARRAN. And it is signed by Ida Epstein.

Mrs. DILLING. It was in the pamphlet.

Senator McCARRAN. It shows Frankfurter was on the national committee.

Mrs. DILLING. Yes.

Senator McCARRAN (reading):

In reply to your letter of the 14th Inst., I regret that we cannot send at this time any copies of The Right to Advocate Violence and Call to Action. We will probably reprint the former and shall be glad to send you a batch then.

Is that the letter to which you referred?

Mrs. DILLING. That is one of them.

Senator McCARRAN. Can you give the committee any closer contact between the writer of this letter and Mr. Frankfurter than merely the fact that Mr. Frankfurter's name appears as a national committeeman on the letterhead?

Mrs. DILLING. It is an organization document, and he is part of the organization. That is all. It is issued by the American Civil Liberties Union as such.

Senator McCARRAN. I just want to say at this time, Mr. Chairman, that I believe this situation should be explored by this committee, and I believe that we should go to the bottom of it and find what it means.

Mrs. DILLING. Would you like to go through this literature and let me show you all that? I can prove they are a close communistic and revolutionary organization. I have many of their reports. I can get everything they have ever issued, if I haven't already got it. Here is a searing headline, "Let Freedom Ring," and all that sort of thing. Angelo Herndon, a Negro Communist agitator, is the author of that.

Senator McCARRAN. This letter on the American Civil Liberties Union letterhead appears to be a photostat. Do you have the original?

Mrs. DILLING. Well, I guess I can get it. I have a photostatic copy of a letter sent out by William Weinstone, assistant executive secretary of the Communist Party, which shows what they are doing and gives Frankfurter recommendation of certain attorneys for that "red" case.

Senator McCARRAN. Have you submitted a photostatic copy of that?

Mrs. DILLING. I think that has been submitted. I am sure it is here. I have a whole bunch of them here.

Senator McCARRAN. You referred to a photostatic copy of what purported to be a statement made by Dean Wigmore. Do you want that filed with the committee?

Mrs. DILLING. Yes; you might like to read it.

Senator McCARRAN. Let me advise you that a record is being made of your statement which will be printed.

Mrs. DILLING. That is all right.

Senator McCARRAN. The exhibits which you desire to bring before the committee and before the Senate will be identified and inserted in the record.

Mrs. DILLING. I will be glad to get them for you. I will help in any way I can.

Senator McCARRAN. I think the reporter can do that.

Mrs. DILLING. I will be very glad to do it. I will leave all of this with you.

Senator McCARRAN. Are all these to be inserted in the record?

Mrs. DILLING. I don't care what you gentlemen do with it. If it is any help to you, I will be glad to leave it with you.

Senator McCARRAN. Mr. Chairman, I will ask that this letter on the letterhead of the American Civil Liberties Union, signed by Ida Epstein and dated March 16, 1931, which was referred to by the witness now before the committee, be inserted in the record.

Senator NEELY. Without objection, the letter referred to will be incorporated with the record.

(The document referred to is here set forth in full, as follows:)

FREE SPEECH

FREE PRESS

FREE ASSEMBLAGE

AMERICAN CIVIL LIBERTIES UNION,  
100 FIFTH AVENUE.

New York City, March 16, 1931.

In reply to your letter of the 14th instant, I regret that we cannot send at this time any copies of "The Right to Advocate Violence" and "Call to Action." We will probably reprint the former and shall be glad to send you a batch then.

Here is a list of our publications. Won't you check the ones you want? Or if there aren't (?) you want at this time, we will of course refund your money.

Sincerely yours,

IDA EPSTEIN.

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 Julia C. Lathrop  
 Agnes Brown Leach  
 Arthur LeSueur  
 Henry R. Lindville  
 Robert Morss Lovett

Mary E. McDowell  
 Anne Martin  
 Alexander Melkielejohn  
 Henry R. Mussey  
 A. J. Muste  
 Walter Nelles  
 William L. Nunn  
 Julia O'Connor Parker  
 William Pickens  
 Amos Pinchot  
 Jeannette Rankin  
 Edward A. Ross  
 Elbert Russell  
 John A. Ryan  
 John Nevlin Sayre  
 William Scurlett  
 Joseph Schlossberg  
 Vida D. Scudder  
 Arba Hillel Silver  
 John F. Sinclair  
 Clarence R. Skinner  
 Norman M. Thomas  
 Edward D. Tittman  
 Albert M. Todd  
 Millie R. Trumbull  
 William S. U'Ren  
 Oswald Garrison Villard  
 B. Charney Vladeck  
 David Wallenstein  
 George P. West  
 Peter Witt  
 L. Hollingsworth Wood

Senator McCARRAN. I have not had the time to look over the others. I think the statement made by Dean Wigmore and referred to by the witness should be inserted in the record.

Senator NORRIS. Together with Professor Frankfurter's reply.

Senator NEELY. Without objection, the article by Dean Wigmore, which appeared in the Boston Transcript of April 25, 1927; the reply thereto by Dr. Frankfurter, published in the same paper on April 26, 1927, a further statement by Dean Wigmore, published in the Transcript May 10, 1927, and Dr. Frankfurter's reply published in the same paper on May 11, 1927, will be inserted in the record.

(The articles referred to, respectively, are set forth in full at the close of the statement of this witness.)

Senator McCARRAN. With regard to the other exhibits, would it be agreeable if some member of the committee or the chairman went over them to see whether they should be inserted in the record?

Senator NEELY. Without objection, Senator McCarran, Senator Austin, and Senator Connally will examine the documents and determine which of them, if any, shall be inserted in the record.

Are there any other questions?

Mrs. DILLING. If the committee would care for a copy of my book, with Mr. Frankfurter's record in it, I will be glad to leave it with you. If what I have said is not true, I ought to be in jail. It was issued in 1936. If the facts there are not true, then I ought to be in jail. Probably if Frankfurter gets in power I will be, but I am out so far.

Senator NEELY. I observe that on page 46 of *The Red Network* you speak of Dr. Glenn Frank in language similar to that which you employ in characterizing Dr. Frankfurter.

Mrs. DILLING. Would you like to go into Glenn Frank's record at Wisconsin University? I could go into it. He is not as potent, but he has been in a small way effective in the "red" movement.

Senator NEELY. Do you feel that he and Dr. Frankfurter are equally anti-American?

Mrs. DILLING. I would say that Frankfurter has been much more influential. He is one of the brilliant minds in connection with the "red" movement. It will be a terrible thing in every community in this country when he is put on the Supreme Court Bench.

Senator NEELY. Do you not consider Dr. Frank a brilliant man?

Mrs. DILLING. Oh, yes. I have his record here. I can go into that with you, if you want to.

Senator NEELY. Will you let me complete my question?

Mrs. DILLING. Yes.

Senator NEELY. Do you not know that Dr. Frank has been made the chairman of a committee of a hundred prominent Americans to formulate a policy for the Republican Party?

Mrs. DILLING. I know all about it, and I know all about him, and why that was done, I don't know. The figures we have got show that there were a good many who have no place to go, unless the Republican Party will clean up and throw out that minority.

Senator NEELY. Is it not a fact that, in your opinion, Dr. Frank is just as dangerous to the United States as Dr. Frankfurter is?

Mrs. DILLING. They are two different individuals. I could not rate them. If you want the record of Glenn Frank, I can give it to you. He is a dangerous man.

Senator NEELY. Is it not a fact that in your book *The Red Network*, you criticize Chief Justice Hughes, Justice Brandeis, Justice Cardozo, Justice Roberts, and Justice Stone as vigorously as you have criticized Dr. Frankfurter?

Mrs. DILLING. I didn't know Hughes was in it. I knew the rest of them were. I don't keep all these radicals in my mind.

Senator NEELY. On page 76 of your book you refer to the decision of the Supreme Court of the United States in what was known as the *Minnesota Mortgage Moratorium case*.

Mrs. DILLING. Yes.

Senator NORRIS. And you refer to Senator Norris and Dr. Frankfurter in much the same way you refer to members of the Court.

Mrs. DILLING. I didn't know this was a hearing on anybody but Frankfurter. I could give you statements on every one of these men. I didn't consider that you would hear them.

Senator NEELY. Do you recall having written the following, which appears on page 76 of your book?

The law under review authorized owners, when about to lose their property through foreclosure, to apply in court for a 2-year extension of time in which to redeem their holdings. The invalidating decree of the district court was reversed by the Minnesota Supreme Court, and the latter's decision was upheld at Washington (Chief Justice Hughes and Justices Brandeis, Cardozo, Roberts, Stone (radicals, three of whom were appointed by President Hoover), against Justices Butler, McReynolds, Sutherland, and Van Devanter (Constitutionalists)).

**Mrs. DILLING.** In citing a case that is decided, does that mean that I list them as enemies of the country?

**Senator NEELY.** No; but you list them as radicals, and later in your book you set out the names of various alleged radicals, including Mr. Justice Brandeis.

**Mrs. DILLING.** Oh, well, Justice Brandeis is one of the most radical individuals in the United States.

**Senator NEELY.** Will you inform the committee whether you consider Dr. Frankfurter or Mr. Justice Brandeis more dangerous to the United States?

**Mrs. DILLING.** I consider that Brandeis is the father of the policies and social philosophies of Frankfurter. I believe in that respect they are father and son.

**Senator NEELY.** Which do you consider the more radical of the two?

**Mrs. DILLING.** I simply set down the facts and let the people who read them judge for themselves. I don't say a certain man weighs 42 pounds of radicalism. You can make anything out of that you want. Most of these people I have never seen. I get all this information from their records.

**Senator NEELY.** Have you not also condemned Jane Addams in about the same way you have condemned Dr. Frankfurter?

**Mrs. DILLING.** Absolutely; oh, yes. I will tell you about Hull House: I was very much surprised when somebody told me she was a "red." I had always looked upon her as being a mother to humanity. I met her in court. I said, "Why are you helping the Communist movement?" "Oh," she said, "I am not a member of the party." I showed her the letterhead with her name on it. She was one of the leading radicals in the United States. At one time you could not get a job as teacher in a university unless he was put through Hull House. I think she did it for humanitarian purposes, but it doesn't matter why she did it. I think many people with good intentions are more harmful than those with bad intentions. There are a lot of idealists who advocate the "red" system of government, and they have a following. People see them and hear them talk and follow them. If the majority of the people of this country adopt that kind of system, we will have to accept it, but there is no use of going into it blind as the Russians did.

That is the way with a lot of the people in that movement. What they hear sounds wonderful to them, and I believe a good many of those people are sincere. In my opinion, we do not want a system of collectivism or state dictatorship, as Bernard Shaw said. A lot of these people advocating peace, if they had their way they would follow a system that could cause war. I like our own form of Government, and I think we should stay independent and use our own judgment in these matters. I think there is a widespread sentiment in favor of that. If you put this man on the Supreme Bench, I am sure the Senators will regret the day they did it.

When you once get him on there, you can't get him off.

**Senator NEELY.** Do you not think his opinions would be like those of Justice Brandeis?

**Mrs. DILLING.** The same. If anything, they would be worse.

**Senator NEELY.** Would you be in favor of removing Mr. Justice Brandeis because of his radicalism?

Mrs. DILLING. I would love it.

Senator NEELY. In hastily looking over your book, I see that you have cataloged a large number of distinguished citizens.

Mrs. DILLING. Yes. Read what I say about them.

Senator NEELY. Among those whom you have indicated that you consider dangerous are Dr. Glenn Frank, former Senator Costigan, of Colorado; Senator Shipstead, of Minnesota——

Mrs. DILLING. Read what I said about them and see if it isn't true.

Senator NEELY. Senator Borah, a member of this subcommittee.

Mrs. DILLING. Sure. I knew he would be here.

Senator NEELY. Senator Norris?

Mrs. DILLING. Yes.

Senator NEELY. Senator La Follette?

Mrs. DILLING. Yes.

Senator NEELY. Senator Frazier?

Mrs. DILLING. Yes. Read what I say about them.

Senator NEELY. Some members of the committee will be surprised by your appraisal of these distinguished men.

Mrs. DILLING. You can't tell unless you read the facts. I will give you a copy of the book if you will study it. I don't say anything about people that is not true. I will give you a copy of it.

Senator NEELY. And you similarly appraise President Roosevelt and Mrs. Roosevelt.

Mrs. DILLING. Do you want the evidence on them? I have got it here. Give me 15 minutes, and I will give it to you. If what I said about Roosevelt is not so, I ought to be in jail.

Senator NEELY. I do not want you to be sent to jail, but apparently if you could, you would send to jail all those whose names I have read.

Mrs. DILLING. I do not want them in jail, and I do not want them on the Supreme Court. I don't want them to set up a Socialist or Communist form of government in this country. I don't want my children to live under that kind of government. I want the kind of freedom we have had in the past. I don't want the kind of colleges that Justice Brandeis was connected with, where they teach communism and have free love and nudist colonies. Mrs. Brandeis is a sponsor. I will give you their record. I will tell you the truth.

Senator NEELY. You have some feeling against the Harvard Law School?

Mrs. DILLING. Yes.

Senator NEELY. And also against Senator Wheeler, of Montana?

Mrs. DILLING. I am not going to mention him along with some of the rest of them. I believe Senator Wheeler has changed. I understand he has introduced a bill to nullify that American Civil Liberties Indian Act that was socialistic and socialized all the Indians in this country. There is a lady present here today who represents the Indians, who has actually fainted from hunger in trying to get their cause before their people. I believe Senator Wheeler has done that. I believe he has introduced that kind of bill, to repeal that outrageous Indian Act that was sponsored by the American Civil Liberties Union, and which socialized all the Indians in this country. The Indians didn't want it, and they never did want it.

Senator NEELY. Did Senator Wheeler change because he had read your book?

Mrs. DILLING. He was given a copy of it, and his wife is a Christian woman.

Senator NEELY. I do not doubt that she is.

Mrs. DILLING. Maybe he was misinformed.

Senator NEELY. That is all, Mrs. Dilling.

(The documents heretofore referred to in the statement of Mrs. Dilling and ordered incorporated in the record, to wit, the articles by Dean Wigmore and replies thereto by Dr. Frankfurter, are here set forth in full, as follows:)

#### J. H. WIGMORE ANSWERS FRANKFURTER ATTACK ON SACCO-VANZETTI VERDICT

##### A Fair Trial—Facts as Well as Law Reviewed by Supreme Court

THE ACCEPTED AUTHORITY ON LEGAL EVIDENCE FINDS THE HARVARD PROFESSOR'S ARTICLE FULL OF MISREPRESENTATIONS AND A GROSS LIBEL AGAINST HONOR OF MASSACHUSETTS COURTS—A DEFENSE OF THE CONDUCT OF JURY, JUDGE, AND PROSECUTION

(By John H. Wigmore)

(John H. Wigmore is one of the leading legal authorities of this country. Since 1893 he has been professor of law at Northwestern University, and since 1901 has been dean of the law school at that institution. He was graduated from Harvard in 1883 and from the law school in 1887. After practicing in Boston for 2 years he became professor of Anglo-American law at Kelo University in Tokio, Japan. He is the author of many articles and books dealing with intricate legal problems, and in 1909 was president of the American Institute of Criminal Law and Criminology. During the war he served on the staff of The Judge Advocate General of the United States Army with the rank of major and was awarded the Distinguished Service Medal for his services. He has been decorated by the Governments of Japan and France, and has received honorary degrees from the University of Wisconsin and Harvard.)

To vindicate Massachusetts justice, I crave the opportunity of your pages to address the lawyers of the Commonwealth. I was first admitted to the bar in Suffolk County, Mass.; I learned to know and respect the temper and the standards of justice in that State; sentiment and duty urge me to offer a few words in refutation of a gross libel that is now being circulated against the honor of its courts because of the verdicts and decisions in the Sacco-Vanzetti murder case.

That case concerned the cold-blooded robbery and murder of a paymaster and his guard at a shoe factory in Braintree on April 15, 1920; the verdict of guilty was brought in on July 14, 1921; and the intervening time has been occupied by two motions for a new trial and by proceedings in review, leading to two decisions of the supreme judicial court—the last one on April 5, 1927.

In the meantime, an agitation against the fairness of the trial and the justice of the verdict was started among various alien Communist circles; and this was extended to the general public by the publication in the March 1927 Atlantic Monthly of a 14-page exposition of the case by a prominent pundit in a leading law school (followed by a longer pamphlet publication, from the same press, advertised at \$1). This Atlantic Monthly article, being an attempt to arouse the public sentiment of the entire Nation to the disparagement of the Massachusetts courts, has had noticeable success in press comments. Its dangerous plausibility naturally calls for some exposure of its errors.

##### NITHER FAIR NOR ACCURATE

Your space does not permit a detailed analysis of the Sacco-Vanzetti evidence; but I hope that it does permit a statement of the reasons why this article in the Atlantic Monthly is wholly devoid of credit as a basis for outsiders to form an opinion, and why the decisions of the State supreme court should be accepted with confidence as decisive of the justice of the case.

The plausible pundit of the leading law school begins by calling the case "one of international concern," and by stating that the article aims "to give in the briefest compass an accurate résumé of the facts of the case." It ends by alleging that "the reader has now had placed before him fairly, however



briefly, the means of forming a judgment!" and the editor adds this testimonial, that the article is a "complete and accurate résumé of the facts of the case," "compressed accurately and fairly by a trained and responsible lawyer."

I propose to show you that the article is neither fair nor accurate nor complete, both in vital details of the trial and in the "international concern" of the trial, and that the decision of the supreme judicial court amply refutes its basic charges.

#### A. THE TRIAL ITSELF

Take first the trial itself. The gist of the article is, by assertion and insinuation, that the trial judge and the prosecuting attorney "connived" throughout to employ unfair methods; and in particular that they evaded the weakness of the evidence of the accused's homicide guilt and exploited the accused's character as "red" radicals; thus turning the trial into a persecution of "reds" instead of a trial for homicide, and cajoling a packed jury of local patriots into a false verdict.

Now, let us see how the plausible pundit goes about it to prove his case to the public.

1. He begins at the impaneling of the jury. We are told (p. 410) that "part of the jury was speedily selected by the sheriff's deputies from Masonic gatherings and from persons whom the deputies deemed 'representative citizens,' 'substantial,' and 'intelligent.'" We are told again that the jury was "picked for its respectability." And the reader would thus never know that in fact a panel of about 675 jurors was examined, and by the trial judge himself, before the 12 were found. Nor that counsel for defense accepted all of them as satisfactory. Nor that, so fair was the prosecution, when the twelfth juror was finally found provisionally by the court, the defense having by then exhausted its challenges, the prosecuting attorney offered to use one of his remaining challenges if counsel for defense was not satisfied with that juror, and that counsel for defense accepted him without availing himself of the offer.

#### NO PICKED JURY

So that the insinuation of a "picked" jury was baseless, and worthy only of unscrupulous yellow journalism. And the public can rest well satisfied with the pronouncement of the supreme court (suppressed by the plausible pundit), in its opinion denying the motion for a new trial on this ground (151 North-eastern Reporter 830) that no "fraud or partiality in favor of the Commonwealth or material injury to the defendants is shown."

2. Again, at the end of the trial, attacking the trial judge's opinion on denial of the second motion for a new trial (October 23, 1926) the plausible pundit refers to it as a "farrago of misquotations, misrepresentations, suppressions, and mutilations," and gives two alleged illustrations of them. (a) One is this: "• • • a judge who gives meretricious authority to his self-justification by speaking of the verdict which convicted these men as 'approved by the supreme judicial court of this Commonwealth. The supreme court never approved the verdict, nor did it attempt to do so. The supreme court passed on technical claims of error, and finding no error, the verdicts are to stand.' Judge Thayer knows this, but laymen may not. Yet Judge Thayer refers to the verdict as 'approved by the supreme court.'"

#### "APPROVAL" VS. "AFFIRMED"

Well, Judge Thayer did not refer to it as "approved." He referred to it as "affirmed," which is a perfectly correct technical expression, and not "meretricious" nor a "misrepresentation." Judge Thayer referred to the higher court's opinion four times. The first time he said: "The supreme judicial court decided that the evidence was sufficient to warrant verdicts of 'guilty of murder in the first degree,' and that those verdicts should stand." The judge's second reference says: "Why, then, if the supreme judicial court has affirmed those verdicts does it become necessary for this court to defend that jury against the charge of unfairness?" The judge's third reference says: "To set aside a verdict of a jury affirmed by the supreme judicial court of this Commonwealth on such an affidavit would be a mockery of truth and justice." The judge's fourth reference says: "The only question is whether the verdicts of the jury, that have been affirmed by the supreme judicial court of this Commonwealth, should be set aside on the confession of Madeiros." And the

supreme judicial court itself, in its opinion of April 5, 1927, quotes without remark the very same expression of the trial judge: "• • • the verdicts of the jury that have been affirmed."

So the trial judge did not say that the verdicts had been "approved;" and here the "misrepresentation" is by the plausible pundit, not by the trial judge. It is a libel on the worthy trial judge, in that it charges him with knowing falsity in an official statement.

#### MORE MISREPRESENTATION

(b) The other "misrepresentation," etc., of the trial judge is this: "William G. Thompson (counsel for defense after the trial) is one of the leaders of the Boston Bar; yet Judge Thayer thus characterized Mr. Thompson's activities in behalf of these two Italians: 'Since the trial before the jury of these cases a new type of disease would seem to have developed; it might be called "lego-physic neurosis" or hysteria, which means, "a belief in the existence of something which in fact and truth has no existence." Now, the judge did not apply those words to the leading counsel's "activities on behalf of these two Italians." He applied them to a single part of the counsel's argument on the 1926 motion for new trial, viz, the part alleging a conspiracy between Mr. Sargent, Attorney General of the United States, and the local authorities to convict these accused because they were radicals and not because they committed the homicides. And how baseless was this allegation, how "hysterical," may be gathered from the supreme judicial court which in its 1928 opinion says, on this point: "The trial judge would be compelled to find that no substantial evidence appeared that the Department of Justice • • • had conspired to secure their conviction by wrongful means." So that the ridiculous idea of a "conspiracy" at Washington was the only thing referred to as "hysteria," and not the learned counsel's "activities on behalf of the accused." This was a plain misrepresentation.

Well, these are three important misrepresentations in the plausible pundit's "accurate résumé" as to the trial in general.

Now, let us look briefly at the evidence that is "fairly placed before the reader."

3. An important part of the prosecuting attorney's case was the copious lies (admittedly) told by the accused on their arrest—lies about their weapons and their whereabouts. Those lies, betraying their consciousness of guilt, were explained by the accused as due to their supposition that they were being arrested preliminary to deportation as alien "reds," and to their fear of being deported to Italy. Several minor circumstances discounted the truth of this explanation; but the main and convincing one, as against Sacco's explanation, was that he had obtained and carried in his pocket at the very moment of arrest on May 5, 1920, a passport upon which he and his family intended to sail for Italy 2 days later. The defendant's cross-examination shows the bearing of this fact:

"Q. Mr. Sacco, you say you feared deportation, and that is why you told all these lies and why you did what you did?

"Answer. Yes.

"Q. Mr. Sacco, at the very time when you were telling these lies, you had already secured a passport for Italy, on which you, your wife and two children were to sail 2 days after the night of your arrest?

"Answer. Yes."

Now, the possession of this passport was the strongest fact to show the falsity of Sacco's explanation. But in the plausible pundit's "fair résumé" of the evidence, the fact of its possession is not mentioned. "Suppressio veri," etc. How could an honest résumé fail to mention that fact? It undermined the main case of the defendant Sacco.

#### WHAT KIND OF JUDGMENT

4. Again: There were only two physical objects connecting the accused with the exact spot of the homicide—the revolvers and a cap. The murderer going off in the car was bareheaded and a cap was picked up near the body of one of the murdered men. The victim's wife testified that it was not his, but Sacco's employer testified that it was similar to one worn by Sacco and usually hung near the machine where he worked, and this cap was placed upon Sacco's head when testifying and appeared to fit him.

But, in the plausible pundit's "fair résumé," not a word about this cap. He offers "the means of forming a judgment"—but, what kind of a judgment?

5. Coming to the article's main reiterated theme, the exploitation of the defendants' "red" views and character, the plausible pundit, after carefully evading mention of the fact that it was on the accused's direct examination that the first mention was made of these things (so as to support their explanation of the reason for their lies), proceeds to accuse the judge and the prosecuting attorney of making the trial "a riot of political passion and patriotic sentiment"; thus: "Up to the time that Sacco and Vanzetti testified to their radical activities, their pacifism, their flight to Mexico to avoid the draft, the trial was a trial for murder and banditry; with the cross-examination of Sacco and Vanzetti patriotism and radicalism became the dominant issues. Outside the courtroom the 'red' hysteria was rampant; it was allowed to dominate within. The prosecutor systematically played on the feelings of the jury", and the trial judge "connived at—one had almost written, cooperated in—the process." There was a "deliberate effort to excite the emotions of jurors"; "the real purpose" was "to inflame the jury's passions."

Now, all this palaver seeking to make the reader believe that the judge and the prosecutor thrust the defendant's "redism" into the case, and then illegally and unfairly exploited it—all this palaver is a consummate misrepresentation. The facts were that not a word was offered on the subject in the case in chief; that defendants' counsel themselves insisted on bringing in those facts in defense as the only hope of overcoming the effect of the case in chief; that the judge and the prosecuting attorney urged upon defendants' counsel caution in making the decision to do that; and that the prosecutor's cross-examination did not deal with a single fact of such character which had not already been voluntarily told by the accused on their direct examination.

#### CRUEL LIEB.

These facts are so demonstrative of the cruel and libelous falsity of the whole tenor of the plausible pundit's article that a moment may be spent in verifying them. The judge's statement in denying the second motion for a new trial (October 24, 1926) recites them: "The government closed its case without there having been the slightest reference made to radicalism. Counsel for the defendants made his opening statement, and in that statement there was not a word mentioned about radicalism."

"The first time it was suggested that it was to be introduced was when Vanzetti was on the witness stand (being the eighty-fifth witness). And after several hours of direct examination, and shortly before adjournment one afternoon, counsel for the defendants stated to the court that all of the counsel were agreed that it was necessary to go into the subject of radicalism in order to meet the Commonwealth's claim of consciousness of guilt. The court suggested that it might be well for them to bring in a brother of one of the counsel, who was one of the leading lawyers of the State, for a conference. Counsel adopted and seemed grateful for this suggestion. The next morning counsel informed the court that the conference was had, and all counsel, together with the brother and another distinguished lawyer, had decided that it was fatal if the evidence of radicalism was not introduced." And in argument later upon this same motion, counsel for defendant said to the court: "Radicalism is forced in by logical necessity to explain the conduct which the Government proved. . . . They, the defendants, had to give a reason why they did those things. If they had said nothing, they would have been convicted out of hand."

It was fatal to the accused, on the homicide evidence, if they had not themselves voluntarily disclosed their "redism"; and so they voluntarily did so, after full consideration by their counsel.

#### UNWORTHY OF CREDIT

So what becomes of the plausible pundit's assertions that the prosecutor made a "deliberate attempt to excite the emotions of jurors" by the "red" testimony, and of his insinuations that the judge illegally "connived" at making radicalism the dominant issue? Those assertions are a gross libel and a cruel falsity. And they stamp the whole article as unworthy of credit; for they are the main basis of its complaint.

6. The plausible pundit, however, was faced with the damaging fact that the supreme judicial court, on May 12, 1926, had already handed down a decision

(151 *Northeastern Reporter* 830; 20 pages long), reviewing the whole record, and affirming the trial judge's order denying a new trial. The plausible pundit meets that decision by this evasive comment: "The guilt or innocence of the defendants was not tried in the supreme court. That court could not inquire whether the facts as set forth in the printed record justified the verdict. Such would have been the scope of judicial review had the case come before the New York Court of Appeals. \* \* \* In Massachusetts, what is reviewed is in effect the conduct of the trial judge; only so-called questions of law are open."

This discounting of the supreme court's opinion might well impress the lay public to whom it was addressed. But the lawyer examining the record would discover the complete falsity of its insinuations.

#### WHAT A LAWYER THINKS

(a) In the first place, the gist of the plausible pundit's article is that the trial was made "a riot of political passion" by the district attorney's cross-examination of the accused, "connived at" by the judge. Now, on this main point the supreme court did explicitly and directly negative that charge. They say, "The argument is pressed that the purpose of the district attorney's questions \* \* \* was to excite and intensify prejudice against him. But we must follow the record, and a careful reading of it does not sustain this contention."

(b) In the second place, the plausible pundit, in stating that "the guilt or innocence of the accused was not retried in the supreme court (in contrast with the alleged New York method), is cleverly shifting the issue that he himself started. He does not claim to know that the accused are innocent of murder; he does not assume that the outside public knows it; and his article does not proceed on that impossible assumption. It charges that the accused did not have a fair trial of their guilt or innocence, and that is the gist of all its charges. But the Supreme Judicial Court of Massachusetts, having listened to all the possible grounds urged by counsel for such a contention, has held that the accused did have a fair trial. So the decision, after all, is a flat and square repudiation of the plausible pundit's main contention. His article is in effect an appeal from the supreme court."

(c) And, thirdly, the supreme judicial court did pass upon the issue of guilt or innocence to the extent that ought to satisfy any citizen that has respect for trial by jury. For among the grounds alleged in the motion for a new trial was this: That the trial judge erred in not directing a verdict of not guilty for lack of sufficient evidence of guilt to go to the jury. And the supreme court held that the trial judge committed no error in denying that motion. In other words, there was sufficient evidence to go to the jury. Here are the exact words of the opinion (151 *Northeastern* 830, at 840): "The defendants severally moved for a verdict of not guilty on all the evidence, and the motions having been denied they severally excepted. It is contended on behalf of Vanzetti that his being in the (murderers') car at all could be found to be merely probable and that his presence therein was not proved beyond a reasonable doubt. \* \* \* (Then the evidence is succinctly rehearsed.) The motion was denied rightly."

#### MISLEADING THE LAY PUBLIC

It is at this point that the plausible pundit's misrepresentations are most plausible and most misleading to the lay public. It affirms that the Massachusetts court, on a review, in contrast to the New York court, does not pass upon "whether the facts as set forth in the printed record justified the verdict," but only upon "so-called questions of law." Now (no matter what the New York court does), the point is that by well-known technical phraseology the "so-called questions of law" do include an issue of fact, and that Massachusetts court does pass upon the sufficiency of the facts to justify the jury's verdict, in reviewing a case like the present.

The above quotation from the 1926 opinion shows that they here did do so. But to demonstrate that this is their long-settled practice, and to show clearly the extent of this misrepresentation of the plausible pundit, let us look at the words of the statute: Massachusetts General Laws 1921 (c. 260, No. 9): "A judgment in a criminal case may be reexamined and reversed or affirmed upon a writ of error for any error in law or in fact." And now let us peruse the recent exposition of the court's practice in *Commonwealth v. Dasoulakis* (246 Massachusetts 12, at p. 22 (1928)): "In the early and leading case of *Com. v.*

*Green* (17 Mass. 515), it was decided that power existed in this court (i. e. supreme judicial court) at common law and without an enabling statute; to grant a motion for a new trial in a capital case, in order that 'a prisoner should be indulged with another opportunity to save his life, if anything had occurred upon the trial which renders doubtful the justice or the legality of his conviction.' \* \* \* That was the same as saying that verdicts would be set aside and new trials granted if 'it appears to the court that justice has not been done.' \* \* \* It is difficult to conceive of any ground for a new trial not comprehended within the sweep of the decision in the *Com. v. Green*, or the phrase of the statute." And now see how this principle was applied in a recent criminal case: *Com. v. Vanderberke* (248 Mass. 403 (1924)): "At the close of the evidence the defendant requested the trial judge to rule that the evidence did not warrant a verdict of guilty of murder in the first degree. \* \* \* (Then after reviewing the evidence:) It is plain that her testimony and the other evidence presented by the Commonwealth, if believed by the jury, were sufficient to warrant a finding that the defendant was guilty of murder in the first degree. As there was evidence, if believed, amply sufficient to justify the finding, it could not rightly have been ruled in accordance with the defendant's request, that the evidence did not warrant a verdict of murder in the first degree. The exception to the refusal of this request cannot be sustained."

#### DID INQUIRE INTO THE FACTS

So the decision of the supreme court in April 1926 signified that in the court's opinion there was sufficient evidence to justify the verdict of guilty of murder; the plausible pundit's statement that "the court could not inquire whether the facts justified the verdict" is false; and any citizen who has confidence in a unanimous decision of the Massachusetts Supreme Judicial Court may rest satisfied with that verdict on the facts.

(d) And, finally, what lawyer of experience, in any State, does not know that a supreme court, if it really has any doubts of the justice, on the facts, of a verdict of guilty in a capital case, is astute to lay hold of some point of pure law as a ground for ordering a new trial? It is done every year or oftener, in almost any State. The books are full of such cases. The lay public can be misled; but no lawyer would believe that the Supreme Court of Massachusetts, regardless of the technical ground of their decision, would have failed to direct a new trial, had they seen any reason to distrust the correctness of the verdict on the facts.

And in their second decision (New York Times of April 6, 1927), on the trial judge's rejection of the newly discovered "confession" of the crook Madeiros, as a ground for a new trial, the Supreme Court go even further, in language which shows their attitude on the whole evidence: "An impartial, intelligent, and honest judge would be justified in finding that the confession (attributing the murder to the Morelli gang) gains no persuasive force from the credibility of Madeiros; that the facts relied upon by the defendants in confirmation, if true \* \* \* fall far short of furnishing adequate proofs of their (Morelli's) guilt or of establishing reasonable doubt of the guilt of the defendants. \* \* \* A new trial is not necessary to prevent a failure of justice."

#### AT THE TIME OF THE TRIAL

It is difficult to see how the Supreme Court, under the law, could more plainly indicate their opinion on the facts.

7. As one further item, suggesting the inference that this attempt to charge upon Massachusetts courts a miscarriage of justice is somebody's afterthought, inspired by extrinsic and sinister influences, note this: that the accused's counsel who actually conducted the trial appear to have been entirely satisfied with the impartiality of the judge, the behavior of the prosecuting attorney, and the general fairness of the trial. At the close of the evidence, not a single request for instructions was handed to the judge; and at the conclusion of the charge to the jury, not a single exception was taken to the charge—the charge which the plausible pundit now abuses *ex post facto*. And in the closing address to the jury, one of the defense counsel said: "Mr. Katzmann (the prosecuting attorney) has been, as he always has been, a perfect gentleman. \* \* \* And I want to say, on behalf of these men and their friends—they have had every opportunity here; they have had every patience and every consideration. I want them to know that we have done, that everything has been done, as

Massachusetts takes pride in doing, granting to any man, however lowly his station, the fullest rights to our Massachusetts laws."

Now, how does this plausible pundit come to inject himself into this case, by invoking the Nation's censure on Massachusetts justice, when the counsel at the trial itself had voluntarily paid tribute to the fairness of Massachusetts justice?

The truth seems to be that this whole agitation, *ex post facto*, to the trial, has its roots in a sinister fact, suppressed by the plausible pundit, and to this fact I now come.

#### B. THE INTERNATIONAL ASPECT

The plausible pundit begins by attributing to this case an "international concern," because it has "aroused interest far beyond the boundaries of Massachusetts and even of the United States." Yes, indeed. But he fails to tell us the reason it has aroused such an interest. Another "*suppresso verbi*"; for the reason is a sinister one.

That reason is that the two accused appear to be valued members of a powerful international fraternity or cabal or gang who have, since the trial and conviction, sought to give aid to their convicted associates by the most extensive system of international terrorism that the world has known for a century past. Ever since the trial in 1921, this terrorism has been carried on. If it had succeeded, justice in the United States would be at its mercy.

I did not begin to keep track of the incidents until last summer; but down to the time when my clippings begin, the story in brief is this: Propaganda pamphlets were first distributed in France, Italy, Spain, England, Russia, Mexico, Japan, Central and South America; and the bomb throwing began at American embassies and consulates. In 1921 a bomb thrown at Ambassador Herrick, in Paris, injured his valet. A bomb placed in the American consulate in Lisbon exploded after the consul kicked it away. Threats of death were made to American consuls in Peru, France, and Cuba. Four continents were dotted with these incidents. In Massachusetts, the home of a relative of a Government witness was bombed. Threats of violence were made against officials connected with the trial; and the home of Judge Thayer has been almost continuously under special guard. Eight persons in all were injured by these acts of terrorism. When on May 12, 1926, the supreme judicial court rejected the first motion for a new trial, the threats were renewed and guards were placed at the home of Chief Justice Rugg.

And then, after the second motion for a new trial was denied by Judge Thayer last fall, the terrorism was renewed everywhere, as the following dispatches show (from New York Times and the Chicago Tribune, mostly Associated Press dispatches—they are here abbreviated):

PARIS, February 28, 1927.—After remaining quiescent for several months, the Communist and Socialist agitation against the execution of Sacco and Vanzetti has again assumed disquieting proportions for American officials in France, and within the last 24 hours a heavy guard of police and detectives has been thrown around the American Embassy. The *Sacco-Vanzetti* case has been a almost constant source of worry and anxiety to the Ambassador since the men were sentenced. Many threatening letters have been written from time to time marking him for death if the two Italians were not liberated.

Boston, April 5, 1927 (the day of the second Supreme Court decision).—Police authorities of a number of cities and towns of the State took prompt action this afternoon to protect the justices who concurred in the decision and other persons who have played prominent parts in the case. The Worcester police doubled the guard at the home of Judge Thayer, who has been under police protection for several years.

GENEVA, April 6, 1927.—The United States consulate here has received threatening letters. Police protection was extended to the American Legation and consulates in Switzerland upon receipt of news that a new trial has been denied to Sacco and Vanzetti.

PARIS, April 7, 1927.—A threat in this morning's organ of the Communist Party that its representatives "know how to revenge the martyrs who have fallen victims without mercy in the battle between the oppressors and the oppressed," led the police today to take further precautions to guard Ambassador Herrick and the American Government buildings in Paris from further attack. It is

now the intention of the police to keep Ambassador Herrick within their police protection for 24 days until the case is definitely disposed of.

FALL RIVER, Mass., April 8, 1927.—Policemen guard night and day the home of Judge Dubuque and the Bristol County Court House, since the Supreme Court handed down its final decision in the *Sacco-Vanzetti case*.

Boston, April 9, 1927.—When sentence is pronounced 300 police officers will be on guard to ward off any possibility of the violence which has sporadically been manifested on four continents during the past 6 years of this case.

GENEVA, April 9, 1927.—As an attack is feared upon Hugh Gibson, American Minister to Belgium, who is here attending the League disarmament conference, a special force of detectives has been placed on guard at his hotel.

NEW YORK, April 10, 1927 (the day after the sentence).—The police have arrested Mario Bluchel for posting circulars on windows of the downtown section of New York, declaring "Sacco and Vanzetti must not die." A search of Bluchel disclosed a book containing plans for the construction of bombs.

BUENOS AIRES, April 10, 1927.—A group of gunmen held up a streetcar last night and tried to burn the car. Police in the suburb of Alsina discovered a large unexploded bomb under a railroad bridge. Both incidents, it is believed, were the work of sympathizers of Sacco and Vanzetti, radical agitators who were sentenced to death by a Massachusetts court.

WASHINGTON, April 11, 1927.—Extraordinary precautions have been taken to guard high Government officials because of the death sentences in the *Sacco-Vanzetti case* in Massachusetts. A guard was placed in the State Department corridor near the office of Secretary Kellogg today.

#### SUBJECT TO TERRORISM

Now, is not this an intolerable state of things, that American justice should be subjected to the dictates of international terrorists? Where has the like ever been known in modern history? The Thugs of India, the Camorra of Naples, the Black Hand of Sicily, the Anarchists of Czardom—when did their attempts to impose their will by violence ever equal in range of operations and vicious directness, the organized efficiency of this cabal to which Sacco and Vanzetti belong? And this insensate resort to violence is invoked in a case which has been misrepresented, by the cabal, all over the world, as a case of persecution for radicalism. The dangerous thing to American justice is that the local representatives, by pressing a button, can set this international force in motion to secure immunity for any one of its members who is charged with any serious crime.

#### JUDGES IN JEOPARDY

But what shall we say of the plausible pundit who knowingly enlists himself in their support and appeals to the public at large to excite popular sympathy in favor of the members of this international terrorist gang? Why should he beg the sympathy of the public for them personally? If public sympathy is to figure, why not invoke it for the heroic judge who, through the accident of this trial, has had to do every day's duty for 6 years past in danger of his life? Does not every honorable lawyer sicken at the realization that the judges of this country can be put in jeopardy for any judgment that touches a member of a terrorist fraternity?

And if any honorable member of the bar believed that he ought to help to secure a fair trial even for a bandit or a thug, why should he not, as William G. Thompson here did, add his name gratuitously as of counsel, and assist in preparing and arguing, the case up through the regular channels of justice? Why should he choose to appeal in the press to the general public outside of the Court? Why should he abuse the Court itself in that appeal?

And why should he do so before the Supreme Court has handed down its pending final decision?

And, finally, why should he, in the popular article, make errors and misstatements which if discovered in a brief of counsel filed in the case would qualify him for proceedings for disbarment?

My object is attained if I have indicated to fellow members of the bar they need not give any credit to this libel on Massachusetts justice; and that the two unanimous decisions of the Massachusetts Supreme Judicial Court should give entire confidence in the fairness of the trial and the justice of the verdict.

## PROFESSOR FRANKFURTER REPLIES TO DEAN WIGMORE

DEFENDS THE ACCURACY OF HIS STATEMENTS AND CLAIMS THE DEAN IS NOT COGNIZANT OF THE EXACT TESTIMONY AS REVEALED IN THE OFFICIAL RECORDS

(Prof. Felix Frankfurter, the accuracy of whose writings on the *Sacco-Vanzetti* case was questioned in an article in yesterday's Transcript, by John H. Wigmore, dean of the Northwestern University, Chicago, and an accepted authority on legal evidence, replies as follows:)

Dean Wigmore's article on the *Sacco-Vanzetti* case aside from its vituperation consists of a series of allegations, based presumably upon the official record of the court proceedings. Issues of life and death are too momentous for personal controversy. I shall restrict myself to those items in Dean Wigmore's article which purport to deal with the record and which may therefore be tested by reference to the record. What is to follow may be verified by anyone who will take Dean Wigmore's statements and the incontrovertible official record in regard to his statements. I say without fear of contradiction that Dean Wigmore could not have read the record, could not have read with care the opinion of Judge Thayer, on which his own article is largely based, could not even have examined my little book, to which he refers as "a longer pamphlet publication" of my Atlantic article. The book was documented and detailed in a way which magazine publication does not permit. Let me state succinctly and stripped of all rhetoric the charges of inaccuracy which Dean Wigmore brings against my analysis of the case. I will reply to them one by one.

## TEST OF ACCURACY

1. Dean Wigmore makes one charge which is a test of his accuracy and mine. He accuses me of falsely quoting from Judge Thayer's opinion a statement not to be found in it. I quoted Judge Thayer as saying, by way of self-justification, that the verdict which convicted these men was "approved by the supreme judicial court of this Commonwealth," and added the comment:

"The Supreme Court never approved the verdict, nor did it pretend to do so. The Supreme Court passed on technical claims of error, and finding no error, the verdicts are to stand." Judge Thayer knows this, but laymen may not. Yet Judge Thayer refers to the verdict as 'approved by the supreme judicial court'" (pp. 105-6).

Dean Wigmore writes:

"Well, Judge Thayer, did not refer to its as 'approved.'"

I now quote from Judge Thayer's opinion as printed in the amended bill of exceptions over Judge Thayer's signature, attested by the clerk for the superior court of Norfolk County (pp. 366-7):

"An affidavit from a man of this type must be examined and scrutinized with the greatest possible care, caution and judgment before the verdict of a jury approved by the supreme judicial court of this Commonwealth is set aside.

Clearly Dean Wigmore did not read the record, not even the opinion which he defends. Believing that I had misquoted Judge Thayer, Dean Wigmore calls it "a libel on the worthy trial judge, in that it charges him with knowing falsity in an official statement." Inasmuch as it is indisputable that Judge Thayer did speak of the verdict as "approved by the supreme judicial court of this Commonwealth," I leave it to Dean Wigmore to explain this "knowing falsity in an official statement."

## REFERENCE TO SACCO JURY

2. Speaking of the jury, I wrote "part of the jury was specially selected by the sheriff's deputies from Masonic gatherings and from persons whom the deputies deemed 'representative citizens, substantial and intelligent.'" Dean Wigmore replies "that the insinuation of a 'picked jury' was baseless, and worthy only of unscrupulous yellow journalism." I refer the reader and Dean Wigmore to original bill of exceptions, pages 45, 46-7, 48, 49, 50, 57-8, wherein appears the testimony of the deputy sheriffs which I have accurately summarized in the above quotation.

Further dealing with the jury, Dean Wigmore writes that "counsel for defense accepted all of them as satisfactory." Again, he has not examined the record. If he will turn to original bill of exceptions, page 60, he will find challenge by the defense of the venire out of which the last five jurors were



selected. The defense likewise took exception to the refusal of the court to put to the jurors certain questions with a view to testing their bias. (Original bill of exceptions, pp. 24-27.) Finally, Dean Wigmore could not have read with care the opinion of the supreme judicial court of May 12, 1920, in the official text of which nearly three pages are devoted to the exceptions of the defense based on objections to the selection and interrogation of the jury.

## EXHAUSTED CHALLENGES

Dean Wigmore states as proof of the fairness of the prosecuting attorney that the latter, after the defense had exhausted its challenges, "offered to use one of his remaining challenges if counsel for defense was not satisfied" with the twelfth juror who was provisionally selected. So Judge Thayer states in his last opinion (amended bill of exception, p. 400) "of its (the court's) own knowledge." I beg to refer the original bill of exceptions, pages 30-7, which shows that at the time the twelfth juror was selected each of the defendants still had a challenge. In this conflict, which is not the only one, between the Judge's recollection and the stenographic record of the trial, the official record of the trial must prevail. Such an inaccuracy by a trial court is indeed abnormal—but not in this case. For, by argument between the district attorney and counsel for the defense, several important statements of fact made by the Judge in his decision were declared to be untrue, and in the brief of defendants' counsel and in the argument of the case it was alleged and not disputed by the district attorney that other statements of fact in the Judge's decision were without foundation. It was also shown without contradiction that there were several misquotations by him from the affidavits filed in support of the Madellos confession.

## MENTION OF CAP

3. Dean Wigmore charges me with suppressing mention of a cap found at the scene of murder which the Commonwealth attempted to identify as a cap of Sacco's. If Dean Wigmore will turn to pages 32 and 33 of my book, he will find a summary of the evidence relating to the cap, as well as a reference to the record setting forth this evidence. This particular item of evidence seemed to me too insignificant on its merits for detailed attention in the Atlantic article. Dean Wigmore knows the limitations of magazine publication, but the Atlantic which carried my article also carried notice that "a more detailed account, with all necessary references" was shortly to be published. Dean Wigmore refers to this longer publication, but evidently did not take the pains to examine it before charging me with suppression of evidence. As for the cap itself, it was an ordinary pepper-and-salt cap, of which hundreds of thousands are produced and worn and as to which Sacco's employer testified that it bore a general resemblance to the cap hanging on a nail near where Sacco worked in the factory but explicitly denied that he meant his testimony to be identification of the cap.

4. Dean Wigmore charges me with suppressing important evidence in the case which, according to the *deau*, negatived Sacco's explanation of the lies told by him when arrested. He quotes the following questions and answers from the alleged cross-examination of Sacco:

"Q. Mr. Sacco, you say you feared deportation, and that is why you told all these lies and why you did what you did?

"A. Yes.

"Q. Mr. Sacco, at the very time when you were telling these lies, you had already secured a passport for Italy, on which you, your wife, and two children were to sail 2 days after the night of your arrest?

"A. Yes."

## LATEST OPINION OF JUDGE THAYER

This quotation is evidently drawn by Dean Wigmore from Judge Thayer's latest opinion (amended bill of exceptions, p. 411), but a careful search of the record of Sacco's cross-examination discloses no such questions and answers as Dean Wigmore quotes. Will he not be good enough to give me a reference to the page of the record?

In my analysis of the case, I did state that Sacco planned to go to Italy, for his alibi was based on the fact that on the day of the crime "he was in Boston seeing about a passport to Italy whither he was planning shortly to return to visit his recently bereaved father." (The case of Sacco and Vanzetti, p. 10.) Sacco did not fear return to Italy but he did fear deportation. De-

portation to him meant the fate of his radical friend Salsedo, found crushed to death the day before Sacco's and Vanzetti's arrest. In front of the building in New York where he was confined by Federal agents, immediately upon his arrest having been asked questions about his radical affiliations before other questions were put to him, Sacco lied to protect himself and his radical friends from what was to him the imminent danger of Salsedo's fate.

5. Dean Wigmore defends the cross-examination which exploited at great length the offensive radical doctrines of Sacco by saying that the defense introduced the subject of radicalism. Of course, the defense introduced radicalism. They had to, in order to explain the conduct of Sacco and Vanzetti on their arrest, in order to explain "consciousness of guilt" as consciousness of being radicals and draft dodgers. The prosecution with the concurrence and cooperation of Judge Thayer, utilized this unavoidable disclosure by the defendants of their hated views to excite the passions of the jury against them. The Commonwealth justified this fatal cross-examination on the ground that the district attorney had the right (I am now quoting from the Commonwealth's brief at the first argument before the Supreme Court) "to see whether Sacco's radical views and radical actions were real or feigned" (brief for the Commonwealth, p. 72.) We now know on uncontradicted affidavits that this reason was not the true one, for the district attorney had official information that Sacco and Vanzetti were, in fact, well-known radicals on the "red" list of the Government. The effect of this cross-examination has thus been characterized in a technical discussion of the case, before my book was published, by the present dean of the Yale law school, I quote from Dean Hutchins:

"The Commonwealth was allowed to ask, at a time of intense popular feeling against anarchists and all opposed to the established order, questions emphasizing in a picturesque and telling manner the political views of a defendant on trial for a crime which admittedly had not the slightest relation to those views." (80 Yale Law Journal 384, 388.)

#### OPINIONS OF SUPREME COURT

6. Dean Wigmore will startle every Massachusetts lawyer by his claim that the Supreme Judicial Court of Massachusetts did pass on the facts adduced at the trial; did, in a word, consider the guilt or innocence of Sacco and Vanzetti. The contrary of this claim is authoritatively set forth in the two opinions of the supreme judicial court. In the first opinion, the court wrote, "only errors of law are before us" (151 N. E. 830, 800). As to "matters of fact," the supreme judicial court in its second decision in this case applied the settled Massachusetts doctrine that the "trial judge's findings are final" (Mass. Adv. Sheets, April 5, 1927, p. 625).

And again: "As already stated, it is not for us to determine what is to be believed. The question for us is, Could the judge conscientiously, intelligently, and honestly have reached the result he has reached? (Ibid., p. 627). And, finally, it is particularly significant that Dean Wigmore does not quote the following from the court's opinion, which proves conclusively that the supreme judicial court may sustain the trial court on his refusal to grant a new trial although they may be independently satisfied that in the light of the new evidence a new trial be granted even though the evidence is newly discovered, and, if presented to a jury, would justify a different verdict" (Ibid., p. 624). And Dean Wigmore misquotes the supreme judicial court when he expresses it as their view that "a new trial is not necessary to prevent a failure of justice." That was not the view of the supreme court, but merely a characterization by them of Judge Thayer's decision, which, as a matter of law, they could not reverse. Every lawyer versed in criminal procedure knows that the scope of review of the New York Court of Criminal Appeal is far wider than that of the Supreme Judicial Court of Massachusetts, and allows in a capital case a review on the facts not open to the Supreme Judicial Court of Massachusetts.

#### LEAVES IT TO THE BAR

7. Dean Wigmore charges me with misrepresenting Judge Thayer's opinion insofar as I spoke of his animadversions upon Mr. Thompson as manifesting "a spirit alien to judicial utterance." I have Mr. Thompson's arguments in this case and their characterization by Judge Thayer as the manifestation of a "deep-seated disease" to the judgment of the Boston Bar and to lawyers everywhere who have studied the case.

8. Dean Wigmore quotes from the summing up of one of the counsel for the defense to the effect that the defendants were accorded their rights at the trial. This is cited as proof of the fairness of the trial. When that speech was made in July 1921, as part of an effort to ingratiate counsel with jury, counsel did not know the facts that have since developed to undermine confidence in the fairness of the trial. Counsel did not know that the prosecution's professed ground for cross-examination was a false ground; that important witnesses, known to the State and unrevealed to the defense, were not called because their testimony would tend to contradict essential facts sought to be proved by the Commonwealth; that the district attorney and one of his two experts on a crucial point of the trial, to wit, the identification of the mortal bullet, misled the jury and the court by a calculated ambiguity as to the expert's opinion, he confessedly having no "affirmative evidence whatever that this so-called mortal bullet had passed through this particular Sacco pistol"; and that the most important identification witnesses for the Commonwealth had previously identified the photograph of another criminal as that of the murderer. Dean Wigmore says nothing of these matters, though they are now all matters of public knowledge, all to be found in the record.

Dean Wigmore cares not a whit more than I do about the vindication of the law, he is no more eager than I am to enforce rigorously and with impartiality the criminal law. Because of my experience as a prosecutor I feel perhaps even more keenly than he does the great importance of maintaining confidence in the processes of criminal justice by employing them scrupulously and justly, and above all by remembering the recent admonition of the Lord Chief Justice of England that the State "has no interest whatever in securing a conviction. Its sole interest is to convict the right man." (*R. v. Baldwin*, 18 Cr. App. R. 175, 178.)

#### WIGMORE REPLIES TO FRANKFURTER IN SACCO-VANZETTI CONTROVERSY

SAYS HARVARD PROFESSOR'S ASSERTION EXPLICITLY REPUDIATED BY SUPREME  
COURT—A PROPOSAL TO THE BAR ASSOCIATION OF MASSACHUSETTS

(By John H. Wigmore)

Owing to absence from the city and to urgent local duties, I have not till now had the time to check up the charges in the plausible pundit's reply, which you published on April 20, to my article of April 25 on the *Sacco-Vanzetti* case as set forth in the Atlantic Monthly article. Perhaps I should not again burden your pages. But I have received numerous letters from lawyers and Harvard graduates in various parts of the country, cordially approving my presentation of the subject. And, as the above reply impugns the correctness of some of my conclusions, and those who relied on my statements may have been affected by that reply, I ask space to deal once more with its author, the contra-canonical critic of Massachusetts justice. (I use that expression because the Atlantic Monthly article grossly violates canon 20 of the American Bar Association's Code of Professional Ethics, which condemns "newspaper publications by a lawyer as to pending or anticipated litigation"; especially as in this case, the critic is known to have consulted with counsel of record in the preparation of this case, and to have acted virtually as advisory counsel.)

#### THE REAL ISSUES

Now in controversies with past masters of evasion and insinuation, it is necessary to keep strictly to the real issues. Here the issue is not whether the defendants were actually guilty or innocent of the murder charged; for neither I nor the critic, not having been present either at the killing or at the trial, can possibly assume to pronounce on that question. The only issues raised by the contra-canonical critic, or disputed by myself, are two: (A) Whether the trial was unfair, as alleged in the Atlantic article, and particularly whether it was unfair in being made a "riot of political passion" by misconduct of the prosecuting attorney and the judge; and (B) Whether the decision of the supreme judicial court in May 1926 purported to pronounce that there was sufficient evidence to justify the verdict. If the critic's charges were false on these points, then any sensible citizen (and to no others is it useful to speak) ought to rest

satisfied with the result. Additionally (C) I will comment on a side issue, used as a smoke screen by the critic; and, finally (D), I will suggest a proposal to the Bar of Massachusetts.

A. The fair trial: As to the fairness of the trial, the one concrete charge made in the Atlantic article is that the judge and the prosecuting attorney "connived" to make the trial a "riot of political passion and patriotic sentiment," and specifically by introducing or letting in evidence of the accused's disloyal draft evasion in 1917 and membership in "red" societies of violent antagonism to our Government in 1920. In my comment I showed conclusively that all these facts were kept out in the prosecution's case; that they were deliberately introduced for the first time by the defense counsel, after a friendly warning by the judge to think twice before deciding; that the cross-examination on these subjects did not travel outside of these same facts, and was perfectly legitimate and fair with a view of testing the truth of the testimony; and that the supreme court's opinion of April 1920, when this same point as to the cross-examination was presented on appeal, repudiated it and said that "the record does not sustain this contention."

#### REPUDIATED BY THE SUPREME COURT

Now what does the contra-canonical critic have to say in dispute of my statements and quotations? Nothing—except one thing by way of repetition. He says that "this (legitimate) reason (to see whether Sacco's radical views and radical actions were real or feigned) was not the true one, for we now know on uncontradicted affidavits," etc. Well, the supreme judicial court has already passed upon the reason or purpose of the cross-examination; it said (151 N. E. 805): "These questions were within the rule that a witness may be cross-examined (etc.) \* \* \*. The argument is pressed that the purpose of the district attorney's questions obviously was not the purpose declared by him and accepted by the court, namely, to affect the credibility of Sacco, but was to excite and intensify prejudice against him \* \* \*. A careful reading of it (the record) does not sustain this contention." I am content to accept the supreme court's explicit repudiation of the critic's assertion.

This part of the Atlantic article was the meanest of the misrepresentations; for every lawyer-reader would instantly picture the typical bitter prosecutor, out for a conviction, smashing into the case this illegal and prejudicial evidence, with the support of the hostile judge, and foreclosing the case as a hopeless one from the start. But when you learn the facts as above—learn that the prosecutor did nothing of the kind, that the judge was reluctant to let it be offered, that the defense themselves introduced it as the only hope of escaping conviction on the other evidence, and that the Supreme Court pronounced the prosecution to have violated no rules and to have had no sinister purpose—when you learn all this, you begin to realize what a mean libel it was to charge the court officials with misconduct, and what a mare's-nest in this whole propaganda about "conniving to make the trial a riot of political passion." (And, by the way, a disinterested New York gentleman of the highest standing has just written me, based on his personal observation of Massachusetts justice: "Mr. Katzmänn (the prosecuting attorney) is a capable, high-minded, cultured gentleman, and has been cruelly misrepresented in this matter." And you will remember that counsel for defendants, in his peroration at the close of the trial, gratuitously offered this testimonial, already quoted by me and not denied by the critic: "Mr. Katzmänn has been, as he always has been, a perfect gentleman"; I bring in the gentleman's name here because I consider that the libel on him should receive the fullest and widest refutation in the minds of the public of Massachusetts.)

#### AS TO SUFFICIENCY OF EVIDENCE

B. The second issue is: Did the supreme court, in affirming in 1920 the trial judge's order refusing a new trial, import any opinion on the sufficiency of the evidence to justify the verdict? The contra-canonical critic asserts that it did not. I assert that it did.

1. The only passage in the opinion by the critic in denial is the phrase: "Adduced. 'Only errors of law are before us' (151 N. E. Rep. 800)." Now, this is a very pretty evasion, and for two reasons:

(a) In the first place, that passage occurs in passing upon the facts to be accepted by the trial judge as preliminary to his rulings, after the trial, on

specific grounds for new trial, e. g., "whether the counsel exercised due diligence in bringing the fact of such possession (of cartridges) to the attention of the court." It did not refer to the trial court's ruling as to the trial on the sufficiency of the evidence to go to the jury. These findings of fact of the judge after the trial were of a different basis from the proceedings at the trial; at any rate, the former alone were referred to in the quotation from the supreme court.

(b) In the second place, the phrase "error of law" is well known in the law of evidence to include at least one matter of fact, viz. the sufficiency of evidence to go to the jury. This is what the pundit alludes to in his expression, in the Atlantic article: "Only so-called questions of law are open." Yes, indeed; and one important question of fact happens to be technically called a question of law, i. e., a question for the trial judge to determine, and therefore for the supreme court to review; and it is the very one here involved. Shade of our revered master, James Bradley Thayer! It is only necessary to recall to the hundreds of Harvard Law School graduates in Massachusetts the case of *Ryder v. Wombell* (1. R. 4 Exch. 32), decided 50 years ago, and often cited by the master and in the books on evidence: "There is in every case, not merely in those arising on a plea of infancy, a preliminary question, which is one of law; namely, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies." Now, this is just the question raised at the trial by the motion described in 151 N. E. 840 as a motion "for a verdict of not guilty on all the evidence"; which motion the supreme judicial court said (151 N. E. 840) "was denied rightly. And this is precisely the kind of motion in *Com. v. Vanderhecke* (quoted by me), of which the same court said, in holding it also properly denied: "There was evidence, if believed, amply sufficient to justify the finding."

#### LAW VERSUS FACTS

So when the contra-canonical critic tries to wave away the import of the supreme court's 1926 unanimous decision, by alleging, in his Atlantic article, that "that court could not inquire whether the facts as set forth in the printed record justified the verdict," his assertion is false. That court could, and did, inquire into just that thing, and it used, in the *Vanderhecke* case, a similar motion, just the language which the critic uses in denying that power. And I maintain that the good citizens of Massachusetts ought therefore to rest satisfied with the supreme court's ruling.

2. The contra-canonical critic cites three other passages supposed to bear on the same point. Now those passages are from the second opinion of the supreme court, rendered April 6, 1927, after the publication of the Atlantic article. The critic's article was dealing with the first opinion, and made a false statement about it; and that falsity cannot be removed nor rectified by citing passages from the later opinion. Such evasion is characteristic.

But anyhow, let us go to that second opinion. The passages cited from it are supposed to show that the supreme judicial court in that opinion said nothing about the sufficiency of the Madeiros affidavit, in point of fact, to give ground for doubt. Now those passages were said on other points, and do not bear that interpretation. But to save the lengthy space needed to prove that, read this sentence from the last part of the 1927 opinion (New York Times, April 6): "An impartial, intelligent, and honest judge would be justified in finding that the confession gains no persuasive force from the credibility of Madeiros; that the facts relied upon by the defendants in confirmation, if true . . . fall far short of furnishing adequate proofs of their (the Morellis') guilt or of establishing reasonable doubt of the guilt of the defendants."

The trouble is, you see, that the critic wants the public to believe that the supreme-court opinions signify rulings on "technical claims of error," as he calls them, and that therefore the citizens may well crave somebody's review of the sufficiency of the evidence. I have shown that he is wrong, and I believe that citizens who respect the supreme judicial court may rest satisfied.

#### A SIDE ISSUE

C. Now may I have space for a side-issue raised by the critic? Of his eight points, there is no other which is worth asking space for; enough to say they are either irrelevant or evasive. For example, the critic's "fair," "accurate,"

and "complete" account did not mention the fact, which undermined Sacco's case about fear of deportation, that Sacco had his passport in his pocket when arrested. But, now, says the critic (par. 4): "In my analysis of the case I did state that Sacco planned to go to Italy, for his alibi was the fact that on the day of the crime he was in Boston seeing about a passport to Italy whither he was planning shortly to return." Well, of course, "seeing about a passport already in his pocket when arrested, with his passage fixed for 2 days later. The sting of the fact was right there; and that sting the contra-canonical critic carefully left out, though he fully described the other circumstances of the arrest.

Now the side issue is this: the trial judge's statement that the supreme judicial court has "approved" the verdict.

As to Judge Thayer's phrase about the "approved" verdict, I owe your readers an apology for one error of oversight, but when it is explained it seems to me to make worse the case of the critic. Here is the explanation:

In the Atlantic article the contracanonical critic charged Judge Thayer with writing an opinion full of "misrepresentations" and "misquotations," and gave as an illustration Judge Thayer's use of the word "approved," instead of "affirmed," in speaking of the supreme court's action on the verdict, and added that Judge Thayer knew this was the wrong word but the public might not; thus directly implying that Judge Thayer officially lied in his public opinion. I pointed out that the judge had four times referred to the supreme court's decision, three times saying "affirmed," and not once saying "approved." But now the critic in his letter of April 20, 1927 (par. 1), has been able to find one more passage, a fifth, in that memorandum, in which the judge did refer to the verdict as "approved" by the supreme court, instead of "affirmed."

And the critic offers this discovery as "a test of his accuracy and mine."

Well, what is the issue? The critic told the public that the trial judge's 25,000-word memorandum was "a farrago of misquotations, misrepresentations, suppressions, and mutilations . . . literally honeycombed with demonstrable errors." This is a damnable charge, which if true would destroy public confidence in the judge's conduct of the trial. Then, "one or two illustrations must suffice"; and then comes the illustration that Judge Thayer "gives meretricious authority to his self-justification by speaking of the verdict which convicted these men as 'approved by the supreme judicial court,'" and the insinuation that the judge knowingly deceived the reader.

#### A CRUEL LIBEL

Now, I had gone carefully through that 25,000-word opinion, and I found (as I thought) only four places where the judge referred to the supreme court's action on the verdict, and I quoted all the references I found. Well, I have once more scrutinized the judge's 25,000-word memorandum, and I now find nine references in all to the supreme court's action; in four of these he uses the word "affirmed," in four he uses a phrase "sufficient evidence to warrant" or the like, and in one he uses the word "approved." One such slip of expression in nine references in a 25,000-word opinion is readily explainable as an honest error. This is plain to all. But the critic uses this slip as one of only two illustrations to prove a charge which would blast the judge's standing, and in language nothing short of parliamentary billingsgate.

Since the critic (as we must suppose) himself had read that memorandum of the judge, and seen those nine references to the supreme court's opinion, eight of which were correct, how could the critic as an honorable member of the bar dare to pick out that one single slip and tell all the world that the judge was an official liar? I said it was a cruel libel on the judge; and I repeat that assertion.

#### TO THE BAR

D. Now, in conclusion, I have a proposal to make. Let the Bar Association of Massachusetts, and of Worcester County, and of Suffolk County—all three of them—meet and adopt resolutions (1) expressing their disapproval of any action to "review" the decision of the supreme judicial court; (2) expressing their sympathy for the trial judge in the harrowing and unprecedented ordeal of terrorism which he has endured with such courage for the past 6 years; (3) and recording their emphatic censure of the practice of organizing propaganda and popular pressure to sway the course of justice. If they should

not do this, they would today prove themselves unworthy of the great heritage that is theirs.

If the Bar of Massachusetts should take this body-blow lying down, they would deserve to suffer their profession polluted and their bench bolshevized by agitators financed and led as this one has been.

## FRANKFURTER DENIES HE HAS BEEN SACCO-VANZETTI COUNSEL

### HARVARD PROFESSOR MAKES REPLY TO LATEST STATEMENT FROM DEAN WIGMORE

(The following is the text of Professor Frankfurter's reply to the article by Dean Wigmore in yesterday's Transcript:)

I shall continue to leave vituperation to Dean Wigmore, while I stick to facts. On April 25 Dean Wigmore made serious charges against the trustworthiness of my analysis of the *Sacco-Vanzetti case*. The next morning I made specific reply to each one of these charges, supporting the accuracy of my original statements by exact reference to the official record and the authorities. Dean Wigmore has now attempted a reply, and his original charges have evaporated. As to his gravest charge he has been compelled to admit his own inaccuracy; as to others he has confessed error by silence; and on the technical question of the scope of judicial review on exceptions in a capital case in Massachusetts, as contrasted with the law of New York and of England, he seems to be incapable of learning what is familiar to the bar of this Commonwealth. Let me render very briefly a strict account of Dean Wigmore's charges:

1. He accused me of falsely attributing to Judge Thayer, as a means of buttressing his refusal to grant a new trial on the newly discovered evidence, the statement that the jury's verdict was "approved by the supreme judicial court of the Commonwealth." This statement according to Dean Wigmore, was "a libel on the worthy trial judge, in that it charges him with knowing falsity in an official statement." I thereupon cited the page in the official record over Judge Thayer's signature, from which my quotation was drawn. Dean Wigmore, having found my quotation, now explains his charge against me as an "error of oversight," and characterizes Judge Thayer's language as a "slip of expression."

2. Dean Wigmore made a number of charges in regard to my accuracy in matters dealing with the jury. For each of my statements I made specific references to the record, as well as disproving Dean Wigmore's statements by reference to the other parts of the record. Dean Wigmore's latest reply is silent as to these proofs of my accuracy and his inaccuracy. But he does not make the customary retraction for false charges.

3. Dean Wigmore charges me with suppressing mention of the Commonwealth's evidence in regard to a cup found at the scene of the murder. I referred the dean to the pages in my book in which I gave an accurate summary of the evidence on this point. This has silenced the dean, but again he does not make the customary retraction for a false charge.

### AGAIN ASKS FOR REFERENCE

4. Dean Wigmore charged me with suppressing evidence in the case in connection with Sacco's passport to Italy. Again I referred the dean to the place in my book in which the matter was covered, except for a quotation made by Dean Wigmore purporting to come from the cross-examination of Sacco. I replied to the dean that this quotation had evidently been copied by him from Judge Thayer's opinion, but could not be found on a careful search of the record. I asked him to be good enough to give me a reference to the page of the record on which it appears. I have not yet been vouchsafed this information and should still be obliged to the dean for the reference.

5. Dean Wigmore defended the cross-examination of Sacco, in which he was raked fore and aft for his offensive radical doctrines, on the ground that the defense introduced the subject of radicalism. In my reply to him I pointed out that the defendants had to introduce their radicalism in order to explain their conduct on the night of their arrest, but that this unavoidable disclosure by the defendants of their hated views was exploited by the prosecution. Moreover, I urged that the justification of the Commonwealth for this prejudicial cross-

examination, as a way of testing "whether Sacco's radical views and radical actions were real or feigned (brief for the Commonwealth on the first appeal, p. 72), was no longer tenable since we now know that the district attorney had no doubt about the radicalism of the defendants. He had official information that both Sacco and Vanzetti were on the "red" list of the Government. Dean Wigmore makes a new charge against me by asserting that the supreme court explicitly repudiated this assertion in its opinion reported in 151 N. E. 858.

Does Dean Wigmore really not know that the justification by the supreme court of the cross-examination of Sacco was made in its opinion on the first appeal, rendered on May 12, 1926, before the uncontradicted affidavits upon the motion for a new trial were in existence and disclosed the falsity of the original contention of the prosecution that the cross-examination of Sacco was indulged in to test the truth of the defendants' radicalism?

#### REVIEW BY SUPREME COURT

6. Finally, Dean Wigmore deals with the scope of review by the supreme judicial court of convictions in capital cases. Massachusetts lawyers can have no doubt as to where the truth lies on this point. Both appeals in the *Sacco-Vanzetti* case came to the supreme judicial court on exceptions which, under the Massachusetts statute, only raise "any question of law arising at the trial of such case or upon a motion for a new trial" (g. l. c. 278, p. 31). The scope of review in a similar case before the New York Court of Appeals would be wholly different. In *People v. Guadagnino* (233 N. Y. 344, 349), the New York Court of Appeals expressed the New York law as follows:

"In a case of murder in the first degree this court may order a new trial if it be satisfied that the verdict is against the weight of evidence or that justice requires a new trial. . . . It is not sufficient, as in many other cases brought here for review, that there be some evidence from which the jury could have found a verdict against the defendant.

"In England a convicted person may appeal on any ground which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be sufficient ground of appeal."

The Massachusetts law is the direct opposite. I leave it to those versed in Massachusetts law to deny the great difference between the power of our supreme judicial court and that of the English and New York courts of appeals in criminal cases like *Sacco's* and *Vanzetti's*.

Dean Wigmore appeals to the bar for the expression of their disapproval of any action to "review" the decision of the supreme judicial court. No responsible person has made any such suggestion, unless by innuendo Dean Wigmore wishes to arouse feeling against the exercise by the governor of his constitutional prerogative under the pardoning power. If this is what Dean Wigmore implies, let one of the greatest figures in the history of American law, Mr. Justice Story, explain to him why the pardoning power has lodged in the executive:

#### CITES STORY ON PARDON

"In many cases convictions must be founded upon presumptions and probabilities. Would it not be at once unjust and unreasonable to exclude all means of mitigating punishment when subsequent inquiries should demonstrate that the accusation was wholly unfounded, or the crime greatly diminished in point of atrocity and aggravation, from what the evidence at the trial seemed to establish? A power to pardon seems, indeed, indispensable under the most correct administration of the law by human tribunals; since, otherwise, men would sometimes fall a prey to the vindictiveness of accusers, the inaccuracy of testimony, and the fallibility of jurors and courts . . . .

" . . . . The danger is not, that in republics the victims of the law will too often escape punishment by a pardon, but that the power will not be sufficiently exerted in cases where public feeling accompanies the prosecution and assigns the ultimate doom to persons who have been convicted upon slender testimony or popular suspicions" (Story on the Constitution, 1484, 1497).

Very recently Chief Justice Taft gave similar expression to the indispensable need of this executive power under our form of government:

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford



remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it" (*Ex parte Grossman*, 267 U. S. 87, 120).

I have left all personal animadversions to Dean Wigmore. One reference to me, however, has more than personal implications. Dean Wigmore asserts that I have acted virtually as advisory counsel to Sacco and Vanzetti. In no sense in which lawyers responsibly use the term have I ever been of counsel for Sacco and Vanzetti. Bred as I was in professional standards appropriate for the prosecution by my old chief, Col. Henry L. Stimson, I think there is nothing more vital in securing respect for law than that our profession should see to it that the terrible instruments of criminal justice are kept free from fair reproach of being perverted to unjust ends. Solely with this aim and in this spirit I made a detailed study of the records, briefs, and opinions in the case, and published the analysis set forth in my little book. At no time have I had any other interest, or been subjected to any other influence, than my sense of justice and my devotion to the just administration of the criminal law, to the fair name of our courts and to the honor of this Commonwealth.

### STATEMENT OF JOHN B. SNOW, NEW YORK CITY, REPRESENTING THE LEAGUE FOR CONSTITUTIONAL GOVERNMENT

Senator NEELY. Please state your name.

Mr. SNOW. My name is John B. Snow.

Senator NEELY. Your place of residence?

Mr. SNOW. New York City.

Senator NEELY. Your occupation?

Mr. SNOW. I am Director of the League for Constitutional Government.

Senator NEELY. Is it a corporation?

Mr. SNOW. That is a trade name under which I am carrying on my activities.

Senator NEELY. How many members has it?

Mr. SNOW. We have a corresponding list of about 6,000 names.

Senator NEELY. Are they dues-paying members?

Mr. SNOW. No.

Senator NEELY. Are you an officer of it?

Mr. SNOW. I am director.

Senator NEELY. Who is the president of the organization?

Mr. SNOW. There is no president. It is a trade name. It is not a corporation.

Senator NEELY. You may proceed.

Mr. SNOW. Before I present what information and material I have, and on which I base my opposition to the confirmation of Mr. Frankfurter by this committee, I would like to state that this is the first time I have ever appeared before a congressional body, and it was only because of my belief of the seriousness and the dangers in confirmation of this man to the Supreme Court that I am here today. I hope the presentation of this testimony will be in the proper form.

Before I proceed further I would like to state that it is my firm belief that the executive officer of the Government should have the right to nominate any individual he sees fit, and it is more than natural that he would desire to pick individuals who are in complete accord with his policy. However, the Constitution of the United States pro-

vides that the Senate of the United States has the right and duty to pass on certain executive appointments. This provision of the Constitution was made so that it would have a restraining influence on the executive department, so that through the power of appointment the Executive would not appoint individuals who did not have the confidence of the American people, expressed through their elected Senators.

The Executive has now nominated Mr. Frankfurter to the Supreme Court and it is the duty of the Senate to pass on the advisability and fitness of Mr. Frankfurter. Unless the Senate and this committee carefully consider the advisability of Mr. Frankfurter's being appointed to the Supreme Court they are not fulfilling their constitutional duties to their constituents, nor would they be carrying out the spirit and the letter of the great document.

I oppose the confirmation of Mr. Frankfurter for two main reasons:

First, because he is imbued with collectivist ideas of government and that he and many of his followers seem equally in favor of economic planning. Both of these ideas are completely foreign to the American system of government based on individualism.

Secondly, Mr. Frankfurter for 20 years has been a member of the national committee of the American Civil Liberties Union.

If my testimony is sufficiently well documented and I can prove the two reasons why I do not believe Mr. Frankfurter should be confirmed, I believe that I will have established sufficient evidence before your committee to warrant his rejection to this high office.

From the standpoint of his collectivist ideas this committee should, I believe, accept the statements of individuals who were closely associated with him in two of the alphabetical agencies which were rendered unconstitutional by the Supreme Court. First, let us see what George N. Peek, former Administrator of the A. A. A., has to say. I quote from page 20 of his book entitled "Why Quit Our Own?"

I only know that in the legal division were formed the plans which eventually turned the A. A. A. from a device to aid the farmers into a device to introduce the collectivist system of agriculture into this country. This was due to Jerome Frank—probably acting as a spearhead. He was a lawyer who had practiced in Chicago and New York and had come to Washington, so he told me, at the request of Felix Frankfurter.

On page 18 he states:

The Socialists or, more strictly, the collectivists seemed—for nothing was in the open—to be headed by Felix Frankfurter, Rexford G. Tugwell, and Jerome Frank.

General Johnson, former Administrator of N. R. A., stated that Felix Frankfurter was the most influential single individual in the United States and that he headed "the nucleus of a vast collectivism in which business or any private enterprise are just elements to be absorbed."

At this point I would like to read into this memorandum an editorial appearing in the Washington Herald on November 8, 1935:

#### THE "HAPPY HOT DOGS"

Felix Frankfurter, professor of law in the Harvard Law School, holds no public office, either elective or appointive, in this country.

He cannot be President of the United States because he was born in Vienna, Austria.

Yet this man, who holds no Government position, who is unknown to most people, who lives far away from practical life in the recesses of a college law

library, who is a foreigner by birth, "is the most influential single individual in the United States," according to Gen. Hugh Johnson, who, because of his former close relations with the administration, knows whereof he speaks.

This Frankfurter—this silent man, brought up in his early years, at least, in an atmosphere where political liberty and the ideals of Jeffersonian democracy were regarded as criminal—is the doctrinaire ear-whisperer, the Ingo of this administration.

It is from Frankfurter, who has lived for days in the White House, that the socialistic ideas that guide this administration emanate.

The administration today is surrounded by a ring of linked frankfurters who are known as "the happy hot dogs." Their tails wave madly when they hear the word "Moscow."

Frankfurter apparently brought with him to this country, through prenatal necessity, an antidemocratic, an anti-individualistic, a definitely European mental and emotional set-up.

He is an active member of the communistic American Civil Liberties Union.

And yet not only is this man generally credited with being the chief secret adviser of the President of the United States:

He is the author of many of the suffocating laws that have been thrust upon us.

In General Johnson's positive words, he is "the most influential single individual in the United States."

But Frankfurter is not only all those things. He is also, without a doubt, the man who has dictated scores of influential "key" jobs in the present Government at Washington.

Some of these "happy hot dogs" are Alger Hiss, Paul Freund, Ben Cohen, Charles E. Wyzanski, Thomas Elliott, and Jerome Frank.

That a man of Felix Frankfurter's make-up, whose formative years were passed among click heels and goose-steppers, should want to dominate the United States of America is quite understandable.

Quite naturally these administration "happy hog dogs," under the guidance of their alien-minded mentor from Vienna, look on us, as General Johnson says, as "the nucleus of a vast collectivism in which business or any private enterprise are just elements to be absorbed."

But that such a state of affairs could come to pass in the hundred and fifty-ninth year of the Republic with a President of old American stock in the White House is neither understandable nor natural.

There is no question but that Mr. Frankfurter and the individuals he has recommended for office are thoroughly in favor of economic planning in this country, and in connection with this phrase "economic planning" I would like to submit an extract of the program of the Sixth World Congress of the Communist International, adopted in Moscow in 1928, before the depression.

Senator BORAH. Are you contending that Professor Frankfurter is a Communist?

Mr. SNOW. I am giving you this information. This article I just read was from a newspaper which the public has read.

Senator BORAH. Is it your contention that he is a Communist?

Mr. SNOW. No.

Senator BORAH. Are you prepared to show that he is?

Mr. SNOW. I say he is imbued with a socialistic philosophy.

Senator BORAH. I do not know what you mean by that. Do you contend that he is a member of the Communist Party?

Mr. SNOW. No.

Senator BORAH. Or that he is associated with the Communist Party?

Mr. SNOW. No. I quote from this program:

Provided the proletarian dictatorship carries out a correct class policy—i. e., provided proper account is taken of class relationships—the technical and economic superiority of large-scale socialized production, the centralization of all the most important economic key positions (industry, transport, large-scale agriculture enterprises, banks, etc.) in the hands of the proletarian state, planned

management of industry, and the power wielded by the state apparatus as a whole (the budget, taxes, administrative legislation and legislation generally), render it possible continuously and systematically to dislodge private capital.

Therefore, any legislation which furthers collectivism or economic planning such as has had the full support of Mr. Frankfurter has the ultimate aim of the destruction of our form of government based upon individualism and private ownership of property.

My second reason for opposing the confirmation of Mr. Frankfurter is because of his known connection with the American Civil Liberties Union. Mr. Frankfurter has been on the national committee of this organization for many years.

Senator McCARRAN. Are you convinced that the American Civil Liberties Union is a communistic organization?

Mr. SNOW. I have read reports of many cases that the Communist Party was also interested in.

Senator McCARRAN. Have you made a study of that to determine whether or not the American Civil Liberties Union is communistic?

Mr. SNOW. I would call the American Civil Liberties Union a fellow-traveling organization with the Communist Party.

Senator McCARRAN. A fellow traveler?

Mr. SNOW. Traveling along the same ideas in connection with the same principles.

Senator McCARRAN. Then you would call the organization itself communistic, would you?

Mr. SNOW. I believe that is shown in some of our Government reports. The Lusk committee says that 90 percent of the activities of the American Civil Liberties Union are in defense of Communists who are in conflict with the law. That is a Government document.

Senator McCARRAN. Let us go back a little further. I believe you said that Mr. Frankfurter is a member of the directorate of the American Civil Liberties Union.

Mr. SNOW. He is a member of the national committee, from which he has never resigned, regardless of the fact that the committee has been attacked in Government documents and reports of State legislative committees in New York State and Massachusetts. I would like to tell you something with reference to the different governmental organizations which have investigated the American Civil Liberties Union and reported unfavorably on it.

Senator McCARRAN. Do you have that with you?

Mr. SNOW. Yes.

Senator NEELY. Do you have the names of the other members of the national committee, of the American Civil Liberties Union?

Mr. SNOW. I have one of their annual reports. That might help.

Senator McCARRAN. Do you have a letter on which the names appear?

Mr. SNOW. The position I am taking is that this information I am giving, I am giving the committee in the hope that you will investigate it further. As an individual I cannot make a complete investigation. I thought perhaps if I would bring these things to the attention of the committee, the committee would be very glad to make a thorough investigation and determine Mr. Frankfurter's connection with this organization.

This is the annual report of the American Civil Liberties Union for 1933 and 1934. I suppose the names of all the officers are in

there. This organization has been investigated by a United States Senate investigation in 1919 (the Overman Report); the joint Legislative Committee of the State of New York investigating Seditious Activities, 1920; the Special Committee to Investigate Communist Activities in the United States, of the House of Representatives, Seventy-first Congress, 1930; and the Special Commission to Investigate the Activities Within the Commonwealth of Massachusetts of Communistic, Fascist, Nazi, and Other Subversive Organizations, 1938.

These are all duly constituted legislative investigations held in Washington, New York, and Massachusetts.

The American Civil Liberties Union was also examined by the Navy Intelligence Section of the United States Navy; the following is an excerpt from the report which was printed in the Congressional Record on September 10, 1935:

American Civil Liberties Union: This organization is too well known to need description. The larger part of the work carried on by it and its various branches does undoubtedly materially aid Communist objectives.

Probably one of the most devastating statements with regard to the American Civil Liberties Union was made by Matthew Woll, vice president of the American Federation of Labor, speaking at the New York Chamber of Commerce, in New York City, December 15, 1926:

This tendency toward the undermining of the loyalty of our citizens and the security of our Government in time of war finds expression also in the activities of Communists and their sympathizers in the effort to undermine our Government in time of peace.

The most aggressive movement in that direction is that of the American Civil Liberties Union.

No American nor lover of liberty can subscribe to the doctrine contained in the declaration of the American Civil Liberties Union that: "Language unaccompanied by an overt act, even if the logical consequences of it lead to the commission of the act, is legitimate within our conception of free speech. For instance, the advocacy of murder, unaccompanied by any act, is within the legitimate scope of free speech. No man should ever be locked up for what he says. Let him advocate overthrowing the Government by violence. Let him advocate the destruction of property. The time to lock him up is when he actually starts to do anything."

It must be clear to all that preparation for revolt against the State is as criminal as the attempt to carry it out.

Senator BORAH. What is the main work of the American Civil Liberties Union? Is it not really that of defending people charged with crime when they think they may have been unjustly charged? Is not that correct? They do not advocate lawlessness; they do not advocate the use of force; they simply undertake to see that individuals charged with crime receive justice. Is that not true?

Mr. SNOW. As far as that part of their work is concerned, I would say that is all right. I want to quote right now from Matthew Woll, if I may, a vice president of the American Federation of Labor.

Senator CONNALLY. Is he on the national committee?

Mr. SNOW. He certainly is not. He is a vice president of the American Federation of Labor.

It must be clear to all that preparation for revolt against the State is as criminal as the attempt to carry it out.

The foregoing fundamental doctrine of the American Civil Liberties Union can further but one end, and that is to encourage constantly the commission of crime and rebellion, and it is the most effective shield Communists could hope to

and in our country in the promotion of their revolutionary propaganda and procedure.

Another instance of pernicious and, strangely enough, successful activity of the American Civil Liberties Union was its triumph in securing the padlocking of the Bureau of Investigation of the United States Department of Justice. In accordance with the recognized practice of all civilized nations, our Government, through its various investigating bureaus, has kept itself informed of the activities and plans of Communist and subversive movements seeking its overthrow.

These protective measures so excited the inner circles of the American Liberties Union that its representatives rushed to Washington to interview Judge (now Supreme Court Justice) Harlan F. Stone, then Attorney General. Later they boasted and gloated in their literature and letters, that through their efforts in the name of "civil liberty" they had succeeded in bringing about the discontinuance of such investigations of revolutionary activities. In fact, the Bureau was ordered to discharge all of its "under-cover men," numbering about 80. As a consequence our national Government is now without direct knowledge of activities in these subversive movements, through which it had previously been enabled to thwart many destructive plans before they came to fruition. Thus again has the cause of communism been well served.

Senator NORRIS. Are you through with Mr. Woll?

Mr. SNOW. Yes.

Senator NORRIS. He is a prominent official of the American Federation of Labor, is he not?

Mr. SNOW. Yes.

Senator NORRIS. Do you not think it would be fair to get at all the facts, and to likewise quote the endorsement of Dr. Frankfurter by the president of that same organization, Mr. William Green, who, I understand, has heartily endorsed the name of Dr. Frankfurter.

Mr. SNOW. Mr. Green's statement regarding the American Civil Liberties Union—

Senator NORRIS (interposing). No; regarding Mr. Frankfurter. Mr. Green has endorsed him, has he not?

Mr. SNOW. I do not know. I have not seen that statement.

Senator NORRIS. It was published in several papers.

Mr. SNOW. He has a right to his idea, and I have a right to mine.

Senator NORRIS. That is all right. I am not objecting to that. You are quoting from this officer of the great liberal organization, Matthew Woll and you are attempting to influence by that this committee to reject the nomination of Mr. Frankfurter. The president of the same organization endorsed Frankfurter. How do you reconcile that with the other?

Mr. SNOW. Let us go to the other side of labor. Let us take Mr. Lewis.

Senator NORRIS. I have no objection to that, but when you are citing Matthew Woll you seem to conclude that he is opposed to Frankfurter because he is a member of the American Civil Liberties Union.

Mr. SNOW. That is not what I said.

Senator NORRIS. And then, on the other side, we have the endorsement of Frankfurter by Mr. Green, the president of that same organization.

Mr. SNOW. I did not say that Mr. Woll was against the appointment of Mr. Frankfurter.

Senator NORRIS. But we must conclude that he would be against him, because of his statement about the American Civil Liberties Union.

Mr. SNOW. The statement I was quoting from was in 1926.

Senator AUSTIN. May I recall to you that you were answering a question addressed to you by one of the members of this committee, which was whether that organization to which you were referring was one that advocated violent utterances which might result in revolution, and it was in answer to that that you were quoting Mr. Woll. Was that the purport of your testimony?

Mr. SNOW. And Mr. Woll was quoting from a statement by the American Civil Liberties Union.

About 5 years prior to this incident, on May 27, 1920, a group of 12 radicals of the self-styled National Popular Government League, made a public attack upon the United States Department of Justice which was a bitter and misleading statement of alleged illegal practices in connection with its activities in arresting, prosecuting, and deporting alien revolutionaries.

This report even attacked the right of the United States Government to use funds to discover and deport anarchists and Communists seeking its destruction.

A subcommittee of the Senate Judiciary Committee investigated the charges and found them to be false.

Senator NORRIS. Is that the same article signed by Frankfurter and 11 others that is already in the record?

Mr. SNOW. I do not believe all the names were on it.

Senator NORRIS. If you are referring to something different, I would like to put it in the record. Is it the same article?

Mr. SNOW. I think it is the same.

Senator NORRIS. That is already in the record.

Mr. SNOW. I would like to submit the pamphlet, if I have it here, showing a number of individuals on that committee. One of them was Frank P. Walsh, the defense attorney for W. Z. Foster.

Roger Baldwin, who is one of the active heads of the American Civil Liberties Union, and therefore intimately associated with Mr. Frankfurter on the national committee, in the Thirtieth Anniversary Report of Harvard College, Class of 1905, published June 1935, submitted the following statement under his name:

I have continued directing the unpopular fight for the rights of agitation, as director of the American Civil Liberties Union; \* \* \* I have been to Europe several times, mostly in connection with international radical activities, chiefly against war, fascism, and imperialism; \* \* \* My "chief aversion" is the system of greed, private profit, privilege \* \* \* I am for socialism, disarmament, and ultimately for abolishing the state itself \* \* \* I seek social ownership of property, the abolition of the propertied class, and sole control by those who produce wealth. Communism is the goal. It all sums up into one single purpose—the abolition of the system of dog-eat-dog under which we live, and the substitution by the most effective nonviolence possible of a system of cooperative ownership and use of all wealth.

The same Roger Baldwin stated the Marxist position as it is generally understood by radicals when he said (the Socialism of Our Times, p. 77):

Trade-unionism alone furnishes a class base of revolutionary power for the exploited masses.

I would rather see violent revolution than none at all \* \* \* Even the terrible cost of bloody revolution is a cheaper price to humanity than the continued exploitation and wreck of human life under the settled violence of the present system.

Although much information regarding the American Civil Liberties Union is contained in the official government documents, I would like

to call your attention to their program of activities for 1934 contained in their annual report published under the title "Liberty Under the New Deal."

2. Campaign to support changes in the immigration and deportation laws to end all inquisitions into political and economic views, to protect alien political refugees in the United States, and to admit aliens to citizenship regardless of their views on public issues.

Also quoting from page 9 of the same document:

Despite the severely restrictive laws against aliens, the Department of Labor has liberalized its regulations at those points where laws do not interfere. The secret service section of the Department of Labor was abolished. Alien students in colleges and universities were permitted to get work to help them through. For the first time in over 10 years radical aliens have been permitted to come to the United States as visitors. Two well-known Communists, Tom Mann and Henri Barbusse, were permitted to conduct lecture tours against war and fascism. Emma Goldman, deported anarchist, was allowed to return to visit her family and friends and to appear upon the lecture platform. A citizens' commission appointed by the Department to overhaul both laws and regulations made specific recommendations for liberal measures which, however, were not introduced in Congress in time for passage. Deportations on political grounds have diminished. Lawless methods by agents of the Department of Labor have been firmly dealt with.

The recent Dies committee has received a large amount of testimony and many exhibits of the literature put out by the American Civil Liberties Union from such reasonable sources as representatives of labor and the American Legion. Mr. John P. Frey, also a vice president of the American Federation of Labor, made a very complete and devastating report against the American Civil Liberties Union to the Dies committee, and in that report he also quoted a former statement of Green regarding the American Civil Liberties Union. That organization was also investigated and reported on by the American Coalition of Patriotic Organizations, consisting of about 110 organizations. It contains over 12 pages of documents material to the American Civil Liberties Union.

Before confirming Professor Frankfurter to the highest court in this land it would seem incredible that the Senate of the United States should not thoroughly investigate this evidence and such as has been previously given before State and congressional committees and such as can be given by the United States Army and Navy intelligence sections.

After all, a man is known by the company he keeps. Mr. Frankfurter has been an intimate associate of individuals believing in the foreign and alien political and economic policies of collectivism and for many years has been a member of the national committee of the American Civil Liberties Union, whose record on subversive activities have been fully known to the American people through many legislative inquiries investigating seditious activities.

In closing my testimony, I would like to call this committee's attention to the fact that when Mr. Frankfurter in 1932 was appointed by Governor Ely as judge of the Supreme Judicial Court of Massachusetts, the protests were so vigorous and widespread in a section of the country where he was best known that on the eve of the public hearing regarding his appointment Mr. Frankfurter withdrew his name, thereby putting an end to the public hearing.

The facilities of an individual to make a complete report regarding Mr. Frankfurter, of course, are extremely limited, but as this



committee has granted my request to be heard in opposition to the confirmation, I trust I have given you information of a nature that should cause this committee to make a very thorough investigation before taking any action. Haste in confirming the appointment of Mr. Frankfurter to the Supreme Court may establish a dangerous precedent.

I ask this question: Can we trust a member of the Supreme Court who has championed un-American ideas of collectivism and who has been associated with an organization widely condemned for its un-American activities to uphold the letter and the spirit of the Constitution against all its enemies and, in particular, to pass on the constitutionality of cases now on their way to the Supreme Court in which subversive groups are vitally interested?

I will await the decision of this committee with great interest.

Senator CONNALLY. What is the organization you represent with a trade name?

Mr. SNOW. The League for Constitutional Government.

Senator CONNALLY. How is it financed?

Mr. SNOW. It is a policy-editing organization publishing pamphlet material which is sold for a price and distributed throughout the country to a great many different individuals.

Senator CONNALLY. Do you not receive any contributions from any source?

Mr. SNOW. The most of the funds are received from the sale of literature. There have been from time to time some small amounts contributed. It is practically my own efforts. It is not incorporated. It is a trade name that I operate under as an individual.

Senator CONNALLY. You say it is a trade name. Do you mean a commercial proposition?

Mr. SNOW. No. There is no profit in it. I have never received one cent as salary.

Senator CONNALLY. If there is any profit, you get it, do you not?

Mr. SNOW. There has not been any.

Senator CONNALLY. Has there been any loss?

Mr. SNOW. Yes.

Senator CONNALLY. Do you finance that yourself?

Mr. SNOW. A good part of it.

Senator CONNALLY. A good part?

Mr. SNOW. Yes.

Senator CONNALLY. Do you just estimate your membership?

Mr. SNOW. No. Nobody is supposed to be on the list who does not desire to purchase some of the material.

Senator CONNALLY. Do you use the newsstands or bookstores, or it is by mail?

Mr. SNOW. Mostly by mail.

Senator CONNALLY. How long have you had that organization?

Mr. SNOW. About 4 years.

Senator CONNALLY. What was your business before that?

Are you a lawyer?

Mr. SNOW. No. I have been associated with industry, and also in Wall Street. Here are some of the pamphlets I have published. I can furnish you a good deal of information, if you care to have it. I can furnish you evidence showing that the Socialist platform in 1932 had a program to carry out the New Deal. I can show you the testi-

mony of Mr. Matthews before the Dies committee, which was widely distributed. I will be glad to submit anything I have ever published.

Senator NEELY. If there are no other questions, the subcommittee will adjourn, and reconvene in this room at 2 o'clock.

(Whereupon, at 12 noon, a recess was taken until 2 p. m.)

#### AFTER RECESS

At the expiration of the recess, the hearing was resumed.

#### STATEMENT OF ALLEN A. ZOLL, NEW YORK CITY

Senator NEELY. Please state your name, where you live, your occupation, and for whom you appear.

Mr. ZOLL. My name is Allen A. Zoll, of New York. I am a sales consultant. The first page of my statement I want to give as an individual, and the balance as a representative and executive vice-president of the American Federation Against Communism.

Senator McCARRAN. Where were you born?

Mr. ZOLL. Atchison, Kans.

Senator McCARRAN. Are you a lawyer?

Mr. ZOLL. I am not actually a practicing lawyer. I studied law at Harvard, but did not finish. I got into business and became a sales consultant 9 years ago.

Senator McCARRAN. What are you doing now?

Mr. ZOLL. I am a sales consultant.

Senator McCARRAN. Are you in the employ of anyone?

Mr. ZOLL. I am an independent sales consultant, just like members of the legal profession who have various clients. My name sounds German, but my last ancestor who came to this country came in 1763, and before that they came over as far back as 100 years previous to that time. I think I am a thorough American. My ancestors fought in the War of the Revolution, in the Civil War, and some of them were officers in the Army in the World War.

I would like to have my statement kept out of the press. I go to a good many Communist meetings, and it would greatly impair my usefulness if it became spread around the Communist Party.

Senator NEELY. You may proceed, Mr. Zoll.

Mr. ZOLL. There are two reasons why I oppose the appointment of Prof. Felix Frankfurter to the Supreme Court of the United States. One is because I believe his record proves him unfitted for the position, irrespective of his race, and the other is because of his race.

Senator NEELY. You are opposed to him because he is a Jew?

Mr. ZOLL. I think that I can give you reasons for that, not because I am anti-Semitic, but quite the contrary.

Senator NEELY. Your statement would indicate that you are opposed to him because he is a Jew.

Senator McCARRAN. Perhaps the chairman did not get the full import of your statement. Will you make it again?

Mr. ZOLL. There are two reasons why I oppose the appointment of Prof. Felix Frankfurter to the Supreme Court of the United States. One is because I believe his record proves him unfitted for the position, irrespective of his race, and the other is because of his race.

Senator NEELY. You oppose his appointment because he is a Jew, but still you are not anti-Semitic.

Mr. ZOLL. That is quite right, sir. I think that my statement will clearly show the reasons for that.

Let me deal with this racial question first. I recognize that an able Jew is as able as anyone else and that a fine Jew is as fine as anyone else, and I also recognize the fact that there have been and are many brilliant Jews.

Senator BORAH. Are we to understand that you oppose him because he is a Jew?

Mr. ZOLL. Partly, sir.

Senator BORAH. So far as I am concerned, I do not propose to listen to an argument against a man because of his religion.

Mr. ZOLL. If you will let me finish my statement—

Senator BORAH (interposing). You are raising the same question that is drenching Europe in blood.

Mr. ZOLL. No. I am trying to prevent that in this country.

Senator BORAH. In this country we do not deny any man privileges because of his religion or race.

Mr. ZOLL. Quite right, sir.

Senator BORAH. If you deny a man the right to hold office, it is just the same as if you denied him the right to hold property. It is exactly the same question. I do not think we want to hear the race question debated in any public hearing in this country.

Mr. ZOLL. Am I to understand that you forbid me to make my statement?

Senator BORAH. So far as I am concerned, I want it understood that I am strongly opposed to anyone raising the race question.

Mr. ZOLL. Mr. Senator, may I say that I am not at all anti-Semitic. My statement will indicate that I want to prevent something that will cause anti-Semitism in this country.

Senator BORAH. You want this committee to reject Frankfurter because of his race.

Mr. ZOLL. Partly, because it would be bad public policy.

Senator BORAH. That has nothing to do with the question of public policy.

Mr. ZOLL. In my opinion, sir, it has everything to do with it.

Senator BORAH. One of our principles of our Government is that a member of any race has the same rights as a member of any other race. Why do you say you oppose him because he is a Jew?

Mr. ZOLL. Because it would be bad public policy and would stir up more anti-Semitism in this country. I have a very brief statement on that subject. If you ask me not to make it, I will comply with your request.

Senator KING. May I say that I agree with Senator Borah that it is outrageous to oppose a man because of his race when he is entitled to hold the position. I have letters from friends who are Jews, and they take the position, though I do not agree with them, that to confirm Mr. Frankfurter might tend to develop an anti-Semitic spirit here, which they greatly deplore.

Mr. ZOLL. That is exactly my argument, sir.

Senator BORAH. That is the same argument that has been made abroad on the question.

Mr. ZOLL. Some of the leading Jews feel the same way.

Senator BORAH. That is the same argument being made elsewhere. You want the committee to reject him because he is a Jew.

Mr. ZOLL. If that were the only ground it might not be sufficient.

Senator BORAH. You are making it one of the items for rejection.

Mr. ZOLL. That is right, sir.

Senator BORAH. So far as I am concerned, I do not want to listen to argument against a man because of his race or religion.

Mr. ZOLL. Without meaning to be argumentative, if it would cause an uprising in this country do you think it would be good public policy?

Senator BORAH. There can be no such uprising in this country.

Mr. ZOLL. I believe there would be an uprising, and I believe anyone familiar with the attitude of anti-Semitism which now exists in this country will realize it. Does the Senator suggest I not include that part of my statement?

Senator BORAH. I only say that I do not care to hear it.

Senator MCCARRAN. I think that any member of this committee has a right to object to a statement. I think, however, that whatever is presented that is not offensive might be received.

Senator BORAH. It is offensive.

Mr. ZOLL. My views are not intended to be offensive.

Senator NEELY. As many of you as are in favor of this gentleman's being permitted to continue his statement will say "aye."

Senator CONNALLY. He has already started it, and I am in favor of his going on. It might be explanatory.

Senator NEELY. The Chair wants the committee to decide the question. As many as are in favor of his being permitted to proceed with his statement will say "aye"; contrary, "no." The ayes appear to have it, the ayes have it, and it is so ordered.

Senator HUGHES. I quite agree with Senator Borah, but I think the gentleman should be permitted to say what he has to say.

Mr. ZOLL. Shall I go ahead?

Senator NEELY. Yes; you may proceed.

Mr. ZOLL. It is on account of these I oppose Professor Frankfurter on racial grounds. The reason is that there is today in America an anti-Jewish sentiment that is growing by leaps and bounds. This is recognized universally and has proved a source of grave concern to Jewish leaders. There is no time here to go into the reasons for this increasing anti-Jewish feeling nor would it be pertinent to this case except insofar as a slight résumé may show you that this actually exists.

In many quarters the Jew has been fostering movements that are subversive to our Government and whether rightfully or not, this belief has steadily increased since the advent of the New Deal. In the larger cities it has grown to an alarming degree. To place, at this time, upon the highest court another one of that race is not only a political mistake but a social one.

Even though he were the ablest lawyer in the land—even though he might believe in our constitutional form of government as much as Thomas Jefferson himself—even so, I would oppose him on the grounds mentioned, for the sake of his own people and ours. This appointment, in my opinion, would do more than any occurrence for years to intensify this spreading anti-Jewish feeling, which, if allowed

to grow, will prove disastrous to Christian and Jew alike, in fact to all America.

I feel very sincerely that there is strong opposition to this man, not because he is not a brilliant man, because he is probably the most brilliant lawyer in the country, but because he is a Jew and because of the anti-Semitic feeling that is increasing day by day. I contend that this opposition is growing, and that his appointment will greatly increase that feeling and have a bad effect upon the New Deal, to those of you who are New Dealers. I think it would be the worst thing that could be done to make that appointment.

Senator NORRIS. Are you a New Dealer?

Mr. ZOLL. I am a Democrat and have been a Democrat ever since I was old enough to vote.

Senator NORRIS. My question was, Are you a New Dealer?

Mr. ZOLL. In the 1936 election I voted for it and worked for it.

Senator NORRIS. I do not care whom you voted for. I asked you a courteous question.

Mr. ZOLL. That is right, sir.

Senator NORRIS. I just want a courteous answer, and then I will ask you another question.

Mr. ZOLL. All right.

Senator NORRIS. Are you a New Dealer?

Mr. ZOLL. I believe not.

Senator NORRIS. Then why do you make an argument in defense of the New Deal?

Mr. ZOLL. I say that I am doing that because it will hurt America, and I am an American and opposed to anything of that kind.

Senator NORRIS. You say you are not a New Dealer, but you are opposed to his being appointed because it will hurt the New Deal. That is the point I want to bring out.

Mr. ZOLL. It is a very good point; but if it hurts America, at the same time it ruins the New Deal; that is all right.

Senator NORRIS. I think that is all right. I am not criticizing you. I just wanted to get the facts.

Senator NEELY. Proceed, Mr. Zoll.

Mr. ZOLL. I hope I have covered this subject without too much bloodshed.

Senator NEELY. Is the organization you represent a corporation?

Mr. ZOLL. Yes.

Senator NEELY. Who is its president?

Mr. ZOLL. We have a set of general officers, including about 25 State vice presidents, but we have no president.

Senator NEELY. Do you have a secretary?

Mr. ZOLL. We do.

Senator NEELY. Who is she?

Mr. ZOLL. Mrs. Dana Gude, of Philadelphia. I am executive vice president.

Senator NEELY. How many members have you?

Mr. ZOLL. The organization is formed of a number of affiliated organizations, and there is a membership of between 175,000 and 180,000 in all the affiliated groups.

Senator NEELY. Do they pay dues?

Mr. ZOLL. They pay into their own organization.

Senator NEELY. How much?

Mr. ZOLL. It varies from \$12 a year down to \$1 or \$2.

Senator NEELY. Where is its principal office?

Mr. ZOLL. It was incorporated in New Jersey, and its principal place of business is in New York City, 49 West Forty-fourth Street.

Senator NEELY. Have you received contributions from any source?

Mr. ZOLL. We have had some small contributions, which have been quite few.

Senator NEELY. Do you remember the amount of the largest contribution the organization has received?

Mr. ZOLL. I think \$50. We are not subsidized by any predatory interest.

Senator NEELY. Do you issue a publication?

Mr. ZOLL. We have not yet, but we will.

Senator NEELY. You may proceed.

Mr. ZOLL. But does Professor Frankfurter stand for our constitutional form of government? Will he hand down decisions that are unbiased? We can only judge his future acts by his past record. Let us briefly look at some of the high lights of that record.

It has been the custom to classify the different degrees of radicalism, as, for example, "pinks," "reds," liberals, Socialists, Communists, Marxists, anarchists, Trotskyites, and so forth. But the time has come to stop making such shades of distinction and to draw a line and insist that a person either declare himself as a pro-American, favoring the American institutions which were set up by our forefathers to preserve our American heritage of freedom and liberty, or that he, on the other hand, declare himself as un-American.

I charge that Professor Frankfurter has not only constantly been on the side of these un-American groups for 20 years, but that he has been one of the guiding lights in these un-American forces. As proof of this I will cite a few instances:

First is his membership on the national board of the American Civil Liberties Union. He was on the original board which was formed in March 1920. The name following his on the board was that of William Z. Foster, the No. 1 Communist in the United States. Also on this board are some dozen others of the most notorious radicals and un-American persons in the country. For over 10 years Foster and he served side by side on that board. Foster withdrew in 1931 and Professor Frankfurter, to the best of my knowledge, is still on the board.

Senator NORRIS. You have referred several times to Foster being on the national committee. He withdrew from the organization because it was not sufficiently communistic, did he not?

Mr. ZOLL. But he served with Frankfurter for 11 years.

Senator NORRIS. But that was the reason he withdrew.

Mr. ZOLL. It is still communistic and Frankfurter is still on it.

Senator NEELY. Do you have the names of the national committee of the American Civil Liberties Union?

Mr. ZOLL. I think they were submitted this morning. Perhaps I have a later one.

Senator NEELY. Will you read the names into the record?

Mr. ZOLL. Charles F. Amidon, Harry Elmer Barnes, Herbert S. Bigelow, Edwin M. Borchard, Richard C. Cabot, John S. Codman,

Clarence Darrow, John Dewey, James H. Dillard, Robert W. Dunn, Elizabeth Glendower Evans, John F. Finerty, Elizabeth Gurley Flynn, Walter Frank, Felix Frankfurter, Ernst Freund, Kate Crane Gartz, Norman Hapgood, Powers Hapgood, Thomas W. Hardwick, Hubert C. Herring, Morris Hillquit, John Haynes Holmes, Frederick C. Howe, James Weldon Johnson, George W. Kirchwey, John A. Lapp, Julia C. Lathrop, Agnes Brown Leach, Arthur LoSueuer, Henry R. Lindville, Robert Morris Lovett, Mary E. McDowell, Anne Martin, Alexander Meiklejohn, Henry R. Mussey, A. J. Musto, Walter Nelles, William L. Nunn, Julius O'Connor Parker, William Pickens, Amos Pinchot, Jeannette Rankin, Edward A. Ross, Elbert Russell, John A. Ryan, John Nevin Sayre, William Scarlett, Joseph Schlossberg, Vida D. Scudder, Arba Hillel Silver, John F. Sinclair, Clarence R. Skinner, Norman M. Thomas, Edward D. Tittmann, Albert M. Todd, Millie R. Trumbull, William S. U'Ren, Oswald Garrison Villard, B. Charney Vladeck, David Wallenstein, George P. West, Peter Witt, L. Hollingsworth Wood.

Senator NEELY. Do you consider all whose names you have read Communists?

Mr. ZOLL. No; but some are leading Communists, and they are all in that group side by side.

Senator NEELY. Do you contend that Dr. Frankfurter is a Communist?

Mr. ZOLL. He is not a member of the Communist Party, so far as I can find out. Dr. Matthews, who made himself famous or infamous by testifying before the Dies committee, said he was not a member of the Communist Party.

Senator NEELY. Do you believe that Dr. Frankfurter is a Communist?

Mr. ZOLL. Sir, as I said in the beginning, I think you can get various shades of un-Americanism. I contend he is un-American and on the other side of the line.

Senator NEELY. Then you do consider him a Communist?

Mr. ZOLL. No. A Communist is a member of the Communist Party; but he is un-American and is identified with a group of people who are un-American on this national committee. I have here a document gotten out by the American Civil Liberties Union, published in November 1936, which says that 89 members of the national committee and board of directors represent every shade of economic and political opinions. It says there were 81 Communists, 12 Socialists, 17 Democrats or Republicans, and the remainder not affiliated with any political party. It is my contention, sir, that this committee, of which he has been a member for over 20 years, and this organization is decidedly un-American and the organization is absolutely communistic.

Senator NORRIS. One of the names you read was John A. Lapp. Do you regard him as un-American?

Mr. ZOLL. I do not know him.

Senator NORRIS. Your statements are somewhat misleading. Do you mean to say that everybody whose name you read is un-American? Was not that your statement?

Mr. ZOLL. Not exactly. I said that organization is definitely un-American, and Frankfurter has been one of the guiding lights for about 20 years, a member of it, and supposedly familiar with all the literature they put out, which is pronouncedly un-American.

Senator NEELY. Do you know Professor Meikeljohn?

Mr. ZOLL. Not personally. I know his reputation as a fine scientist. How much he knows about communism I do not know. He would not know very much or he would not allow his name on that committee.

Senator NEELY. But you would not say that he is a Communist or that he is un-American?

Mr. ZOLL. I never looked up his record, sir.

Everyone who knows anything about subversive activities knows that the American Civil Liberties Union has been the spearhead and the defense organization of all the Communists, radicals, and subversive individuals and groups ever since it was founded. Some pertinent things that have been said about it are as follows. The New York State "Lusk" report says:

The American Civil Liberties Union, in the last analysis, is the supporter of all subversive movements; its propaganda is detrimental to the State. It attempts not only to protect crime but to encourage attacks upon our institutions in every form.

This report was made after the committee had received hundreds of pieces of incontestable documentary evidence.

Senator NEELY. How was that committee appointed?

Mr. ZOLL. By the State Legislature of New York.

Senator McCARRAN. Was that statement made after hearing and investigation?

Mr. ZOLL. Yes, sir. They took enough evidence to fill four volumes  $2\frac{1}{2}$  inches thick. This is the report of the committee.

The committee of the Seventy-first Congress, appointed to investigate Communist propaganda, commonly called the Fish committee, officially reported in January 1931:

The American Civil Liberties Union is closely affiliated with the Communist movement in the United States and fully 90 percent of its efforts are on behalf of Communists who have come into conflict with the law. It claims to stand for free speech, free press, and free assembly. It is quite apparent that the main function of the A. C. L. U. is to attempt to protect the Communists in their advocacy of force and violence, to overthrow the Government, replacing the American flag by a red flag, and electing a Soviet government in place of the republican form of government guaranteed to each state by the Federal Constitution.

I believe that the report of the similar committee appointed at the last session of Congress has not been made public, but from the newspaper reports of the testimony brought out before the Dies committee, these two earlier reports of the radical activities of the A. C. L. U. were amplified and verified.

Senator McCARRAN. Is that report you referred to a moment ago in the record?

Mr. ZOLL. I believe it is.

Senator McCARRAN. Can you refer to it by page and volume?

Mr. ZOLL. I beg your pardon. I do not know whether it was placed in the Congressional Record or not, but then Dies committee report was.

Senator McCARRAN. I am not referring to the Dies committee report, but to the Fish committee report. Has that been made a part of the Congressional Record?

Mr. ZOLL. Yes, sir. I cannot give you the page and volume at this time.

Senator McCARRAN. Will you furnish that to the committee?



Mr. ZOLL. Mrs. Dilling informs me that it is House Report No. 2290.

But we do not have to rely solely on the data that investigating bodies have discovered about the A. C. L. U. We can clearly see from their own reports as contained in their annual yearbooks how they stand on un-Americanism. In their 1932 report, when Frankfurter had been a member of the governing board for 12 years, is listed as one of the gains of the year "the decision of the Court of Appeals in New York that atheists' street meetings are not religious gatherings within the meaning of the law and require no permit."

Senator McCARRAN. The case you referred to a moment ago was decided by the Supreme Court of New York?

Mr. ZOLL. Yes, sir. They claimed to have been the ones that got that decision.

Senator McCARRAN. It went through the courts?

Mr. ZOLL. They claimed they got it through the courts.

Senator CONNALLY. You are casting an aspersion upon the court.

Mr. ZOLL. I do not cast any aspersion upon the court. I am protecting the court. It was Frankfurter that cast aspersions upon the court.

Senator CONNALLY. The highest court in New York decided that was not the law?

Mr. ZOLL. There have been decisions of courts that were set aside by other courts as not being accurate. I believe when a court has made a decision, that is the law and should be upheld until overruled by another court.

They also listed as a gain "the establishment of the right to hold Communist meetings without interference." Also as a gain "the defeat of bills sponsored by the D. A. R. of Massachusetts and Minnesota for special oaths of loyalty by school teachers." It prevented Illinois patriots from barring the Communist Party from the ballot. It also endeavored to repeal the moving-picture censorship and the theater padlock law, which allows the padlocking of theaters for showing obscene plays, and so forth.

There has been a good deal of talk about the fact that they simply advocate the right to talk about violence, but do not tolerate violence itself. That statement has been made many times. If Mr. Frankfurter appears before the committee, he will probably say that is the case, but there was one particular instance where that was not the case. That was in Gastonia, N. C., in a textile strike, where they killed a sheriff and some other people in 1920. The American Civil Liberties Union rushed to the defense of those people. They put up \$22,000 bail for those people, and they afterward jumped the bail and every one of them went to Russia. Some of them came back to this country afterward. One in particular came back and said he would rather be in an American jail than in the city of Moscow. That is where they absolutely protected people after the crime had been carried into action, and there were many other instances of equal importance.

Senator NORRIS. Do you think those people should have a trial?

Mr. ZOLL. Certainly.

Senator NORRIS. Did the American Civil Liberties Union do anything except to give them a trial?

Mr. ZOLL. Wouldn't they have got a trial under the law of the land without membership in the American Civil Liberties Union?

Senator NORRIS. Yes; but oftentimes somebody is arrested and charged with a crime, and perhaps a strong feeling among the people in a given territory is worked up against him. Do you think that man should have a trial?

Mr. ZOLL. Certainly. The law provides for that.

Senator NORRIS. Do you condemn a man who contributed to a fund to employ an attorney to defend him, and condemn the attorney who would defend him?

Mr. ZOLL. Are you defending the American Civil Liberties Union?

Senator NORRIS. No; I am not defending anybody. I am not on the witness stand.

Mr. ZOLL. That is right. Neither am I.

Senator NORRIS. Yes; you are. Would you approve the defense of a man charged with any crime—I do not care what it is—under our laws?

Mr. ZOLL. Most assuredly. The laws of North Carolina provide for that.

Senator NORRIS. But it may be necessary to employ a lawyer and to raise some money.

Mr. ZOLL. The laws of North Carolina provide for that.

Senator NORRIS. Probably not.

Mr. ZOLL. They do.

Senator NORRIS. Maybe they do. I do not know about that. Do you mean to say that a man who contributes to a fund to employ a lawyer to defend that kind of a fellow, charged with that kind of a crime, is un-American? I do not know just what was done in that *Gastonia case*. I presume those people were arrested and they wanted to keep out of jail. The American Civil Liberties Union furnished them bail, from what you say. Is there anything wrong about that?

Mr. ZOLL. Furnishing them bail?

Senator NORRIS. Yes.

Mr. ZOLL. No, sir.

Senator NORRIS. All right. That is all I wanted to know.

Mr. ZOLL. The second reason for my contention that Professor Frankfurter is active in un-Americanism is his notorious part in the infamous *Mooney case*. Frankfurter was appointed by President Wilson as counsel of the United States committee which investigated Tom Mooney and which, because of its action under the leadership of Frankfurter, was called the Mooney whitewashing committee. In this connection may I read a letter that Tom Mooney wrote from jail to Stalin. This letter appeared on the front page of the communistic Labor Defender for November 1932. The letter starts:

MY DEAR COMRADE STALIN: After rejoicing over the fifteenth anniversary of the Russian proletarian revolution—

And closes by thanking Stalin—I quote:

for the magnificent spirit of international working-class solidarity by the militant workers of Russia in defense of my fight for freedom and for the freedom of all class war and political prisoners. Were it not for the revolutionary workers of Petrograd, led by our beloved comrade Lenin, in militant demonstrations before the American Embassy on April 25, 1917, I would not now be addressing these greetings to you. Thus my life was saved and my usefulness to the revolutionary working class prolonged. \* \* \* All hail to the Russian Revolution and the dictatorship of the proletariat. I am for it, hook, line, and sinker without equivocation or reservation. Please accept my warm personal regards and best wishes.

I am comradely yours,

TOM MOONEY, 81921.

Thus we see Lenin in Russia and Frankfurter in the United States as the two key men in the world, working together to commute the death sentence of this assassin Mooney, who wounded 40 and murdered 10 innocent persons who were watching a preparedness parade. In connection with the *Mooney case* Frankfurter wrote Former President Theodore Roosevelt asking his support and assistance. The letter which Roosevelt wrote back is a classic. I will read part of it.

Senator NEELY. Is that the same letter that was read to the committee before?

Mr. ZOLL. Yes, sir.

Senator NEELY. The committee will not permit anyone to read the same thing into the record twice.

Mr. ZOLL. Very well, sir. I would just like to call attention to the fact that the Mooney letter to Stalin was written from San Quentin in 1932 and appeared on the front page of a Communist paper. Frankfurter was in this country the man who worked with Lenin in Moscow, and those two, Frankfurter in America and Lenin in Moscow, were the ones that brought about the commutation of the death sentence of Tom Mooney.

Senator NEELY. I suppose you know that a committee of the United States Senate participated in an effort to have Mooney pardoned or given another hearing?

Mr. ZOLL. I understand that was the case, sir.

Senator NORRIS. And you know, do you not, that the President of the United States asked the Governor of California to commute the sentence?

Mr. ZOLL. Do you know why that was done?

Senator NORRIS. Yes; I think I do.

Mr. ZOLL. I wonder if your story agrees with mine.

Senator NORRIS. I do not believe that is material. I would not think very much of my story if it did.

Mr. ZOLL. Mine is that Mr. Lenin brought pressure to bear from Moscow and said if Mooney was not pardoned the Russian forces would not side in with the Allies. I do not know about that, but that is the allegation, sir.

Senator BORAH. That was published in the Daily Worker, was it not?

Mr. ZOLL. Yes, sir.

Senator NORRIS. President Wilson did not want Mooney executed and asked the Governor of California to commute the sentence.

Mr. ZOLL. That is right.

Senator NORRIS. Do you condemn President Wilson for that? If you do, what about the other people?

Mr. ZOLL. Wilson did cause Mooney to be pardoned, and it rather noteworthy in that connection that when President Roosevelt day before yesterday said he wanted all the conservatives to go over to the Republican Party his first recruit in the new Democratic Party is Tom Mooney.

Senator NORRIS. Therefore we ought to reject Frankfurter?

Mr. ZOLL. That does not follow, of course, but I think you should reject him for whatever reason your conscience will give you for so doing.

Senator McCARRAN. With reference to the Mooney case, do you think one accused of crime should be convicted on admitted perjury?

Mr. ZOLL. Certainly not, sir. Was Mooney so convicted?

Senator NEELY. Don't you know that one of the most important witnesses against Mooney confessed that after the conviction his testimony was false?

Mr. ZOLL. I have heard something about it.

Senator NEELY. You do not know it to be a fact?

Mr. ZOLL. I do not know it to be a fact. I do not know whether Mooney is guilty or not. I know a very able court found him guilty, a jury found him guilty, and the man who prosecuted the case said the other day he is still guilty.

Senator NEELY. Christ was found guilty and was crucified, but the world knows that he was innocent.

Senator BORAH. Is it your contention that the President appointed Frankfurter in the *Mooney case* in any sort of judicial capacity?

Mr. ZOLL. He appeared in the public press as counsel.

Senator BORAH. What did Frankfurter do as counsel for that committee to which you find objection? He thought the matter was worthy of publicity.

Mr. ZOLL. That is correct.

Senator BORAH. What did he do that you consider reprehensible?

Mr. ZOLL. That letter of Theodore Roosevelt set forth at the time some of the things that developed. I would like to refer to that without reading it.

Senator BORAH. That letter will not answer the question I have asked.

Mr. ZOLL. It will, sir. It sets forth conduct that I object to on the part of a man who sits on the highest court of the land.

Senator BORAH. Do you remember what the conduct was?

Mr. ZOLL. Yes, sir. He tried to get Fickert recalled. He tried to get Judge Dunne's statement overthrown. That is what Theodore Roosevelt said when Frankfurter asked him to take part in that. He criticized him for working hand in hand with the I. W. W.

Senator NORRIS. Have you read Frankfurter's answer to that letter?

Mr. ZOLL. I have not.

Senator NORRIS. Why are you condemning him?

Mr. ZOLL. I know what he was trying to do.

Senator NORRIS. You should read that letter.

Mr. ZOLL. I have never seen it.

Senator NORRIS. Both of those letters are in the Congressional Record, one following the other.

Mr. ZOLL. The letter I saw was in a Boston paper of June 4, 1919.

Senator NORRIS. If the criticism is proper, it strikes me that when you condemn a man you ought to hear both sides.

Mr. ZOLL. That is correct, sir. To my mind, that is one proper criticism. Here is another. In 1917 there was the famous or notorious Bisbee, Ariz., copper strike, again representing the I. W. W. who pulled that strike, and in their behalf Frankfurter submitted another report. Colonel Roosevelt has something to say about that.

Senator NEELY. What he said is in the Record.

Senator NORRIS. Let me suggest that in the letter, which you confess you have not read, Professor Frankfurter gives his side of the story. Again you are condemning him without reading what he has to say in his own defense.

Mr. ZOLL. I am giving you the words of a man who said he was absolutely misleading in his statement. I say a man who will do that is not fit to be on the Supreme Court.

Senator NORRIS. Assuming that to be true.

Mr. ZOLL. Yes, sir.

Senator NORRIS. Do you still deny him the right to be heard?

Mr. ZOLL. Not in the slightest.

Senator NORRIS. But you have not read his letter.

Mr. ZOLL. In what year was that?

Senator BORAH. 1930.

Mr. ZOLL. I did not read it that year. I have not seen it any place.

Senator NORRIS. It seems to me very clear that you should hear him before you condemn him.

Mr. ZOLL. I would be glad to hear his side; but the fact that Theodore Roosevelt said he was misleading indicates his character.

Senator NORRIS. Even Theodore Roosevelt, when he makes a charge, would certainly give a man the right to defend himself.

Mr. ZOLL. He certainly would.

Senator NORRIS. And you have not read the defense?

Mr. ZOLL. That is right. I would be glad to hear Mr. Frankfurter.

Senator NEELY. Gentlemen, this witness has consumed 18 minutes more than his allotted time. What is your pleasure?

Senator BORAH. He has been interrupted a number of times. I think he should be permitted to finish his statement.

Senator NEELY. Without objection, the witness may proceed.

Mr. ZOLL. Does Frankfurter's appeal as a protagonist who would leave no stone unturned to secure the results he wanted, sound like the impartial, unbiased, judicial mind that is needed today on the highest court in the land—yes; in the world?

A third instance that proves my contention that he is at heart un-American and unfitted for this honor is his activity in the notorious *Sacco-Vanzetti case*. He definitely attempted to whitewash these two anarchist-Communist murderers who were executed yelling "Long live anarchy," and who were made into international heroes by the radical elements of world revolution. In the *Atlantic Monthly* for March 1927 Frankfurter wrote an article on this case which was from start to finish grossly misleading. His article contained many downright untruths and was entirely contrary to the facts and to the evidence produced at the trial. He deliberately twisted parts of the evidence, omitted parts of it which, if brought out, would have prevented him from making his point. The article was quite obviously meant to assist the Communists of the world who were endeavoring to have their comrade-murderers escape the penalty of their crime.

An article by Dean John H. Wigmore attacking and disproving Frankfurter's article, appearing in the *Boston Evening Transcript* of April 25, 1927, a photostat of which I present for your evidence, which is one brilliant American lawyer's damning indictment of this un-American lawyer Frankfurter. A few highlights of Frankfurter's article and the facts in the case follow.

Senator NEELY. Is that the same article that Mrs. Dilling read this morning?

Mr. ZOLL. I think she read part of it.

Senator NORRIS. That entire letter was inserted in the record. The committee will not permit you to read it again.

Mr. ZOLL. That is quite all right. I do not blame you.

In the first place, Frankfurter in that trial said the jury was especially selected by the sheriff's deputies, and all through his article he spoke of the fact that it was a picked jury of blue bloods. The facts are that 675 jurors were examined, and by the trial judge himself, before the 12 were found. So far as the prosecuting attorney was concerned, when the 12 jurors were finally found, the defense having exhausted all its challenges, the prosecuting attorney said they might use one of his own challenges, and they declined the offer.

Dean Wigmore did not mention Frankfurter's name in his articles, but referred to him as the "plausible pundit." I call your attention to what Dean Wigmore said in regard to those matters.

Senator NEELY. What is the date of that letter?

Mr. ZOLL. April 25, 1927.

Senator NEELY. You are referring to the article by Dean Wigmore?

Mr. ZOLL. Yes, sir.

Senator NEELY. That appeared in the Boston Transcript of April 25, 1927.

Mr. ZOLL. That is what I said.

Senator NEELY. Do you know whether Dr. Frankfurter answered that article?

Mr. ZOLL. I do not, sir.

Senator NEELY. Let me inform you that he did, and that his reply was published in the Transcript on April 27, 1927. Did you never learn that this answer had been printed?

Mr. ZOLL. I did not. I have never seen it.

Senator NEELY. You never heard that Dr. Frankfurter had replied?

Mr. ZOLL. No, sir.

Senator NEELY. Do you know that Dean Wigmore wrote a rejoinder to Dr. Frankfurter's reply, which appeared in the Transcript on May 10, 1927, and that Dr. Frankfurter submitted a surrejoinder on the following day?

Mr. ZOLL. I did not see or hear of those.

Senator NEELY. All four of those letters are now in the record of this hearing.

Mr. ZOLL. In conclusion, I would like to give you a quotation from Earl Browder, in Los Angeles, before a select Communist group, which included several of our agents, not known to each other, who reported to us the same thing.

Senator CONNALLY. Agents of whom?

Mr. ZOLL. Of the American Federation Against Communism. We have a number of them in the Communist Party.

Senator NORRIS. You would not condemn them if they were running for office, would you?

Mr. ZOLL. No, sir. We could not get along without them. They risk their lives every day.

Senator NORRIS. They are detectives, as a matter of fact, are they not?

Mr. ZOLL. That is right. Browder, said:

The Communist invasion of the United States has already been won. We have bored so deeply into the Federal Government that we now are virtually in control.

It is my contention, gentlemen, that Felix Frankfurter has been one of the greatest elements in that effective boring into the Federal

Government, and he certainly should not be appointed to the Supreme Court of the United States.

I thank you.

Senator BORAH. I would like to ask if you have made sufficient study of Dr. Frankfurter's statements and articles to know whether he has ever addressed Communists. Do you have any quotations from Dr. Frankfurter himself?

Mr. ZOLL. I do not, sir. He has studiously refrained from saying anything to Communists. To the best of my knowledge, he has never addressed an open meeting of Communists.

Senator BORAH. Has he made any statement in any of his writings or letters or communications which you would construe as indicating that he is a Communist?

Mr. ZOLL. I have seen almost none of his writings, Senator.

Senator BORAH. I would like to have, if it can be found, any statement from Dr. Frankfurter which indicates that he is in sympathy with the Communist doctrine. I think that is important, if it is in existence. If you do not have it, put your followers to work, your agents, and see if you can find anything which you interpret as indicating Dr. Frankfurter is sympathetic to the Communist form of government or that he is unsympathetic with our form of government.

Mr. ZOLL. From his own writings?

Senator BORAH. From his own writings.

Mr. ZOLL. How soon would you need that?

Senator BORAH. I am in no hurry about it.

Mr. ZOLL. I will be glad to do it.

Senator BORAH. Either writings or oral expressions.

Mr. ZOLL. In the meantime, please bear in mind that, having served as one of the chief men of this committee for 21 years, it does not show he is out of sympathy with the entire movement.

Senator KING. You referred to a statement attributed to Dr. Frankfurter in connection with the Bisbee I. W. W. deportations. Was there anything in that statement condemning the I. W. W., or their philosophies, or that evinced any interest either in that organization or its philosophies?

Mr. ZOLL. I have not read that document for some time. To the best of my knowledge, he did not express sympathy with it, but he did represent them and was doing the same thing he did in the *Mooney case*, trying to bring about the recall of the judge. No; I believe that was in the *Mooney case*, that he tried to bring about the recall of the judge. It was the district attorney, instead of the judge.

Senator McCARRAN. It was the district attorney they were endeavoring to recall in the *Mooney case*.

Mr. ZOLL. That is right. His report on that was exactly the same sort of thing that the Communist Party and their agents were trying to have done.

Senator McCARRAN. Have you any publications of the Communists?

Mr. ZOLL. I have not. It did not occur to me to bring any. I did not know until night before last I was to appear before this committee.

Mr. ACHESON. Mr. Chairman, relative to the inquiry about the citizenship of Dr. Frankfurter, I have the papers covering that, which I

will be glad to offer now or at any time that the committee deems proper.

Senator McCARRAN. I would like to emphasize, before this witness leaves, the request made by Senator Borah that the witness try to find written statements or spoken words, properly identified and authenticated, made by the nominee showing his tendency to believe in the Communist movement.

Mr. ZOLL. I will be very glad to do so.

Senator NEELY. I believe you stated that you did not want your remarks published because you visit many Communist meetings.

Mr. ZOLL. Yes, sir.

Senator NEELY. And you desire to avoid publicity because it might result in your exclusion from these meetings?

Mr. ZOLL. Yes, sir.

Senator NEELY. What other organizations similar to the Communists have you visited during the last 3 or 4 years in the discharge of your duties?

Mr. ZOLL. Suppose you ask a specific question.

Senator NEELY. Have you attended any of the so-called German-American Bund meetings?

Mr. ZOLL. I have not. I am not in sympathy with the bund.

Senator NEELY. Have you never visited any of their meetings?

Mr. ZOLL. Never, sir.

Senator NEELY. That is all.

#### STATEMENT OF JOHN BOWE, WASHINGTON, D. C.

Senator NEELY. Please state your name.

Mr. BOWE. John Bowe.

Senator NEELY. And your occupation?

Mr. BOWE. I am a retired disabled veteran.

Senator NEELY. Of what war?

Mr. BOWE. Of the Spanish-American War, and the World War, and the Philippines.

Senator NEELY. Do you appear for any organization?

Mr. BOWE. I appear first as an alien-born naturalized citizen, and also as a veteran.

Senator NEELY. You are opposed to Dr. Frankfurter's confirmation?

Mr. BOWE. Very much opposed to it.

Senator NEELY. On what ground?

Mr. BOWE. If it is necessary, I will leave all of these documents I have here with the committee. I belong to three or four organizations. I used to belong to a dozen before the pinch came. I understand there will be criticism thrown upon me for daring to appear as a veteran and take a stand on this constitutional issue. I realize that you gentlemen represent sovereign States. I am here to bring information to you that is going to startle you. I realize that some of you gentlemen are not going to like what I am going to say any more than I like saying it. The condition of our country at this time is such that you are entitled to the best information possible, and I have got some here that really is surprising.

Senator NEELY. The committee does not want you to restrain yourself because of any fear of its being startled. The committee became shock-proof long before you appeared. [Laughter.]



Mr. BOWE. You see the situation. It is all right to laugh. Nero laughed when Rome burned.

Senator NEELY. The Chairman is also a Spanish-American War veteran, and will join in no manifestation of levity.

Mr. BOWE. Good.

Senator NEELY. You have a comrade on the committee.

Mr. BOWE. All right. Very good.

Now, I would like to give you Frankfurter's military record. He arrived in this country in 1894. He left Harvard University in 1906. He was Assistant United States Attorney in the southern district of New York from 1906 to 1910. He was employed in the War Department of the United States Government from 1911 to 1914. He has been a professor in Harvard Law School since September 1914.

What I am getting at is this: that Frankfurter has specialized in turning out international lawyers as compared with our national lawyers. There is a difference there. These international lawyers are the fixers in the meddling with the tariff and all such matters as that. I want to show you the difference between the different kinds of Jews, because these international people are mostly Jews. They are not the Ghetto Jews. That has come up through the years from the time of Christ.

Senator NEELY. Comrade, are you opposed to this confirmation on the ground that Dr. Frankfurter is a Jew?

Mr. BOWE. Absolutely not on the ground—well, yes. I am not opposed to him as a Jew, if he has proved himself. On his race, I am not; but before he should go into a responsible position he should prove he is entitled to it and understands the principles of our country. He is one that was brought up on a Communist basis rather than our constitutional basis, and should not be entrusted with a responsible position dealing with foreign countries where he could possibly do harm to our constitutional Government.

The reason I am here is by choice. I am not native born and here by accident of birth. I am here because I want to be here. You gentlemen may think what I want to say to you is a reflection on my intelligence, but I am not willing to admit that.

Senator NEELY. You and Dr. Frankfurter are both foreign born, and both chose to come to this country.

Mr. BOWE. He was born on a Communist basis, and I was born on a Christian basis, and our Government is based on Christianity. We have our automatic checks and balances that regulate our country the same as through the threefold plan. You go through the threefold constitution into the threefold trinity, all based on the constitutional law of the land, the divine law of life and the natural law of God. We have got to be careful to preserve our Government, with Trotsky just across the border in Mexico; we have got to look out for that.

What I am going to bring up is this: During the war, when the Spanish War veterans were in the fight, Frankfurter was an assistant to the Secretary of War in the War Department and he issued the orders. Some of these gentlemen from these Jewish societies wanted to change the orderly system of American procedure in regard to majorities. Our Government is built on majorities.

Senator NEELY. Did Dr. Frankfurter have anything to do with that?

Mr. BOWE. It was an order from the Secretary of War and he was his assistant.

Senator NEELY. Did Dr. Frankfurter himself have anything to do with it?

Mr. BOWE. That is something I hope you gentlemen will look up, because it brings up another question. They got that order through that appointed Jewish chaplains in the Army, and before there were Christian chaplains and Roman Catholics. They never had that before.

Senator NEELY. The order of the Secretary of War of which you complain authorized the appointment of Jewish chaplains, and, in effect, placed Jewish rabbis, in this particular, on an equality with Catholics and Protestants? Is that correct?

Mr. BOWE. Yes.

Senator NEELY. And you think that Dr. Frankfurter was partly responsible for the issuance of that order.

Mr. BOWE. I think you gentlemen could find that.

Senator NORRIS. If we investigated and found out that he did not have anything to do with that terrible order, you would withdraw what you are now saying, would you not?

Mr. BOWE. I am not hidebound on this. I am trying to get the facts. I want the facts about these Jewish chaplains and the Jewish welfare agency. It reaches into every section of this country.

Senator NEELY. Mr. Bowe, suppose that Dr. Frankfurter did prevail upon the Secretary of War to issue the order which resulted in the appointment of Jewish rabbis as chaplains in the Spanish-American War, or in the World War, or any other war. Do you think that that fact would justify this committee in rejecting his nomination?

Mr. BOWE. No. What I am getting at now is that in New York City the Jewish religion is organized through these welfare associations, and here is a list of possibly more than 400 organizations in New York City. Every one of them was born in a foreign country, and they are working as a unit. Here is the list. You can see what it is. I think it would be well to leave the list right here.

Senator NEELY. Very well.

Mr. BOWE. Many of these names I can't even spell. They belong or organizations of Jews, from half a dozen different countries, but they are all welded in together.

Senator NEELY. That being your belief, you are of the opinion that no Jew should be made a member of the Supreme Court of the United States?

Mr. BOWE. There is something back of that.

Senator NEELY. Is that your opinion?

Mr. BOWE. I have seen fine Jews. I would not want to make it against his race. What I object to is the Communist sympathizers in their organizations.

Senator NEELY. Have you any specific objection to Dr. Frankfurter, excepting the one you mentioned? I mean the one based upon your supposition that he was in some manner responsible for the order

to which you have referred? Have you any other specific objection to his confirmation?

Mr. BOWE. Yes, sir.

Senator NEELY. What is it?

Mr. BOWE. He ought to have been a different kind of military man than he was. If he had been the right kind of an alien-born citizen he would have gone out and done his best to help in the war, instead of staying here in the War Department and trying to manage it, when it was something he didn't know anything about.

Senator NEELY. Comrade, would you outlaw all who failed to volunteer for service in the Spanish-American War?

Mr. BOWE. I am not trying to outlaw anybody.

Senator CONNALLY. He is talking about the World War?

Senator NEELY. Are you talking about the World War?

Mr. BOWE. The World War, and his staying home and keeping his friends at home. Rabbi Wise, that great man of the Jews, he went into the shipyards for \$8 a week, and he is leading us all into another war.

Senator NEELY. Did not a great many native-born Protestants and Catholics and non-members of churches do likewise?

Mr. BOWE. Yes, sir.

Senator NEELY. They worked on the railroads and in the factories, and on the farms, and in the mines?

Mr. BOWE. Yes, sir.

Senator NEELY. That was necessary. They were producing the necessities of war and life?

Mr. BOWE. Yes, sir; but that could have been done by the older men and the younger men who were not of military age. Just a minute, now. Frankfurter was assistant to the Secretary of War, and he was counsel for the Mediation Committee, assistant to the Secretary of Labor, and chairman of the Labor Policies Board. Frankfurter practically dominated the Labor Department. He had control over who went into the shipbuilding yards and who went overseas. He was in a position to get exemptions for his friends.

When the war was over, mind you, there were a number of professors who came back and practically dominated the Labor Department. Not long after 1932, these professors, in connection with the Council of Foreign Relations, to which Frankfurter also belonged, persuaded the House to pass the legislation that put us into this international labor office in Switzerland. This appointment is going to facilitate and put over this international scheme and put us in whether we want it or not. This gentleman would be in a position to do that.

Now, I would like to say a word about these immigrants coming to this country that will facilitate and promote opening up this question of immigration and naturalization, and also through the financial agencies operating in this country.

Senator NEELY. Did Dr. Frankfurter have anything to do with it?

Mr. BOWE. He is a part of that committee. Mr. Acheson will tell you more about that. When the treaty of peace came to be signed President Wilson went over there, and there were 119 Jews went over with the President and 88 Christians. These Jews were the men who wrote that treaty of peace. They were on the inside with the other international Jews, and today it is those same men who

want to put us into this war; and that is what is going to happen if something is not done about it.

On May 10, 1919, there were two groups in Paris, one American and one British, and they met around the banquet table in Paris for the purpose of consolidating the advantages they had gained.

Senator NEELY. You have consumed all but 3 minutes of your time.

Mr. BOWE. All right. I understand that.

Now, Thomas H. Davis is the head of our Red Cross. I was down here in 1932, and our Red Cross had about 20 or 30 million dollars on hand, and these American soldiers that didn't have a cent or a bite to eat couldn't get a cent.

Senator NEELY. Was Dr. Frankfurter in charge of that situation?

Mr. BOWE. Because he is connected with it. This man Davis is the head of that organization. He is practically sending all the Red Cross men overseas. That is not all. We are at present loaning 25 million dollars to China.

Senator NEELY. Do you blame Dr. Frankfurter for that?

Mr. BOWE. I think without doubt that came down from the Hearst Foundation.

This man Hearst held three of the key positions in California.

Senator NEELY. Your time has expired. If you have anything further to say, you may reduce it to writing and submit it to the committee, and it will be inserted in the record.

Mr. BOWE. All right. One other thing before I go. I stated to you that I was a veteran. I want to tell you gentlemen that a good deal has been going on through the labor movement and in our Veterans' Bureau that ought to be looked into; and men are threatened with having their compensation cut off; and that is the weapon of these national bankers and promoters to exploit the Christian people of this Nation.

Senator NEELY. With due respect to all, the Chair feels impelled to observe that the testimony just heard has no bearing on the question of Dr. Frankfurter's qualifications. The Chair wishes to deal generously with everyone who appears before the committee, no matter what his theory may be, but the Chair hopes that henceforth witnesses will endeavor to confine their evidence and observations to the question before the committee.

#### STATEMENT OF MRS. MARGARET B. HOPPER

Senator NEELY. Please state your name.

Mrs. HOPPER. My name is Margaret B. Hopper.

Senator NEELY. State your profession or occupation and for whom you appear.

Mrs. HOPPER. I have no profession. My occupation is housewife. I am here representing myself as a member of the public and I hope a loyal American. I just want 2 minutes' time.

Senator NEELY. You are opposed to the confirmation of Dr. Frankfurter?

Mrs. HOPPER. I am opposed to the confirmation.

Senator NEELY. You may proceed.

Mrs. HOPPER. I come here simply to state what I have witnessed in the way of opposition from the people themselves, the people in the

city of New York, in Philadelphia, and in Boston, to my knowledge, from personal observation and knowledge of the picketing in New York. Last Sunday when the picketing started at 3 p. m. it continued until about 5:30 p. m. It was made up of people of all kinds who were absolutely opposed to this nomination.

Senator NEELY. What building or institution was being picketed?

Mrs. HOPPER. There were two radio stations being picketed on account of denying the privilege of free speech, but the cry came into the picket line: "Down with Frankfurter." "Keep him off the Supreme Court." "Keep Frankfurter off the bench of the Supreme Court." I testify from hearing these cries myself.

One gentleman standing there was surprised and questioned me. I stepped out of the line and stood by his side. He said, "Why are these people crying against Frankfurter?" I said, "I think I know, but why don't you ask them yourself?" He stopped several of them and put the question to them, "Why are you calling against Frankfurter?" And the answer that was repeated to him several times was, "Oh, Frankfurter is a 'red.' We don't want him on our Supreme Court. We don't want any 'reds' on our Supreme Court. We know all about Frankfurter."

Senator McCARRAN. How extensive was that picketing?

Mrs. HOPPER. There were 2,500 in the city of New York. I heard there were over a thousand in Philadelphia. I can't tell you that from personal knowledge. It is hearsay also about Boston. I am speaking for the city of New York where I saw and heard it.

Senator NEELY. What was the connection between Dr. Frankfurter and these radio stations?

Mrs. HOPPER. There was no connection. It was just in the minds of the people. They had the idea that the stations had been unfair to free speech and the right of true Americans. They represented many different phases. They were not all followers of Father Coughlin. Many were, but not all, by any means. I would say the nucleus were followers of Father Coughlin, but the majority was made up of people who passed by and joined in.

Senator NEELY. Did not the picketing begin as a protest against what those who participated in it thought was unfair treatment of Father Coughlin by the radio stations?

Mrs. HOPPER. That was the nucleus of it. It was not by any means controlled or managed by the so-called Coughlinites.

Senator McCARRAN. When was that?

Mrs. HOPPER. Last Sunday.

Senator NEELY. Was Mr. Zoll at the scene of the picketing?

Mrs. HOPPER. I saw a good many there at that time.

Senator NEELY. Will you please answer my question?

Mrs. HOPPER. I beg your pardon.

Senator NEELY. Was Mr. Zoll there?

Mrs. HOPPER. I saw him there.

Senator NEELY. What, if anything, did he have to do with organizing the "hue and cry" against Dr. Frankfurter?

Mrs. HOPPER. That was not organized. It came from the people themselves.

Senator NEELY. Was Mr. Zoll in the picket line?

Mrs. HOPPER. I didn't see him there.

Senator NEELY. Where did you see him on that day?

Mrs. HOPPER. I saw him standing there watching.

Senator NEELY. Are you a member of his organization?

Mrs. HOPPER. Yes, sir; and I am a member of other organizations.

Senator NEELY. Did you go there with him?

Mrs. HOPPER. No.

Senator NEELY. Did both of you just happen to be there together?

Mrs. HOPPER. I came on my own initiative.

Senator NEELY. Did you have anything to do with the picketing?

Mrs. HOPPER. I took part in it.

Senator NEELY. Are you one of Father Coughlin's followers?

Mrs. HOPPER. No. I am not a Catholic. I have nothing to do with any organization of Father Coughlin's.

Senator NEELY. Did not this picketing have some reference to a refusal of the radio stations to permit Father Coughlin to use them for a certain purpose? I have received a note to the effect that Mr. Zoll was connected with the movement to which you have referred.

Mrs. HOPPER. I don't know that.

Senator NEELY. You said you saw him there. Did he suggest the outcry against Dr. Frankfurter?

Mrs. HOPPER. No, sir. It was taken up by the people. It was just spontaneous by the people.

Senator NEELY. How did you and Mr. Zoll happen to be at the same place at the same time without any prearrangement when these picketers were crying out, "Down with Frankfurter," or something to that effect?

Mrs. HOPPER. I was in New York on my own initiative.

Senator NEELY. It was just a coincidence that you and Mr. Zoll met at the time and place in question?

Mrs. HOPPER. At the time I heard those cries Mr. Zoll was not even within sight. When I heard the cries that attracted my attention.

Senator NEELY. Do you know the author of the cry?

Mrs. HOPPER. No; just some of the people.

Senator NEELY. It was just a spontaneous unanimous cry by 2,500 people?

Mrs. HOPPER. No, sir. I didn't make that statement. It was taken up by a few, then others took it up and joined in. I don't know how many there were, but it was enough to attract my attention, and the attention of this man who was standing there who asked me why they were saying that. They were quite willing to say why they were doing it. I thought it might be of interest to the Senators to know that the people on the streets were using that cry against Frankfurter. That is all I have to say.

Senator CONNALLY. Primarily the picketing was in regard to the question of free speech, was it not? The picketing was not organized in behalf of the objection to Frankfurter?

Mrs. HOPPER. No, sir.

Senator CONNALLY. I understood that to be your testimony.

Mrs. HOPPER. That is true.

Senator CONNALLY. The original picketing had no connection with Frankfurter?

Mrs. HOPPER. That is true.

Senator CONNALLY. In New York there are all sorts of people and races and religion, and a good many street demonstrations are going on all the time?

Mrs. HOPPER. Yes, sir.

Senator NEELY. That is all.

**STATEMENT OF CHARLES CARROLL, WASHINGTON, D. C.**

Senator NEELY. Please state your name.

Mr. CARROLL. Charles Carroll.

Senator NEELY. Where do you live?

Mr. CARROLL. Washington, D. C.

Senator NEELY. What is your occupation?

Mr. CARROLL. Carpenter.

Senator NEELY. For whom do you speak?

Mr. CARROLL. I have just a few words to say as an independent.

Senator NEELY. Proceed.

Mr. CARROLL. I will say first that my grandfather fought in the war with George Washington. I have also another that fought in the Civil War with the North. The only reason that I condemn this man for the Supreme Court Bench is my personal opinion, and I am a member of two or three organizations.

Senator NEELY. What are they?

Mr. CARROLL. I am talking just for myself.

Senator NEELY. What are the organizations?

Mr. CARROLL. I wasn't sent here by them. I represent only myself as an independent.

I think that we have plenty of people in every State in the Union—and you Senators know it—that are three or four generations old, that the President of the United States could have appointed as a Supreme Court Justice. But he failed to do that. And I say, if you Senators think that the general public back in the rural districts, in the small towns, and in the big cities, are for this man, just wait a few days and you will see whether they are or not.

I want to say one thing, and I don't know if you will permit it. There is bound to be a law passed in a short while to prohibit immigration into this country. That is my opinion. If such a law is passed by Congress, it is bound to come up before this man, and I don't think he should be put up there on that Court. I believe you will find that most of the people think the same thing. I can't condemn him because he is a Jew or of any other religion. I do say if you are going to put an alien on the Supreme Court Bench of the United States it will show others in foreign countries that they can come over here and do the same thing. We have them here in every office, and they take advantage of everything they can. I will not say they take advantage, but they will take a good job when they can get it. I was down to the W. P. A. the other night to get a job, and there stood an alien at the door that had only been in the United States 1 year, and he was there to tell me whether I could go in and get a job or not.

Gentlemen, those are the circumstances, and you will find the general public in the United States are against this man, not because he is a Jew, not because of his religion, but because he is an alien and

the general public would be opposed to him going on the Supreme Court Bench.

Senator CONNALLY. You think they are opposed to him because he was born in a foreign country?

Mr. CARROLL. That is right.

#### STATEMENT OF MRS. ALICE LEE JEMISON, WASHINGTON, D. C.

Senator NEELY. Please state your name.

Mrs. JEMISON. Alice Lee Jemison.

I don't have any record with me. If you wish me to state my opposition, I can do that, and I can supply a record later.

Senator NEELY. Where do you live?

Mrs. JEMISON. I live in Washington. I am the Washington representative of the American Indian Federation. That is a nonpartisan, nonsectarian organization of Indians and their intermarried husbands and wives. We were organized in Washington on June 8, 1934, by Indians who came here to protest the enactment of the so-called Wheeler-Howard Act, Public 383, Seventy-third Congress. We have had a national convention each year since that time.

Senator CONNALLY. What was the Wheeler-Howard Act?

Mrs. JEMISON. I will come to that later. Will that be all right?

Senator CONNALLY. That will be all right.

Mrs. JEMISON. We have had our national convention each year since that time. The fifth one was held in Tulsa, Okla., in August last year, the first convention I had the privilege of attending, although I helped to organize that organization. Personally, I am a Seneca Indian from the State of Indiana. All the officers of our organization are Indians.

The purpose of our organization is to secure for all Indians the rights and privileges which belong to them as American citizens. Doubtless it is not known to all the Senators just what the exact status of the Indians is today. They are wards of the Congress of the United States, and whatever Congress does about the Indians, whatever acts of Congress are passed, cannot be subject to review by the Supreme Court. Therefore, we are a people who are denied access to the Supreme Court as a race. As long as we live in a tribal status on a reservation Congress can enact any kind of legislation it wants to for the Indians, and the Supreme Court cannot pass upon it. Therefore, our interest in the Supreme Court is an interest in a Court to which we are denied access.

We are opposed to the appointment of Frankfurter because he is a member of the American Civil Liberties Union. We are a people who have suffered from the legislative program promulgated by that organization for the Indians, and is administered by members of the American Civil Liberties Union. I will state the facts very briefly.

In 1931 the American Civil Liberties Union sponsored three bills for the Indians in the Congress of the United States. No Indian ever requested the American Civil Liberties Union to do that. They had what they called a "civil liberties committee for the Indians." The chairman of that was Nathan Margold and the secretary was Robert Gessner.

Senator McCARRAN. Is that the Margold who is Solicitor of the Interior Department?



Mrs. JEMISON. Yes, sir.

Senator McCARRAN. What was his capacity?

Mrs. JEMISON. Chairman of the civil liberties committee of the American Civil Liberties Union.

That program failed of enactment by the Congress. In 1933 Harold L. Ickes was appointed Secretary of the Interior. He is one of the members of the American Civil Liberties Union. Margold was appointed Solicitor for the Department. He was chairman of the Indian committee of the American Civil Liberties Union. John Collier was appointed Commissioner of Indian Affairs.

In 1935 a committee of the House of Representatives tried to find out whether Mr. Collier was a member of the American Civil Liberties Union or not. They tried for 3 days and he never answered the question. He did say that he had been closely associated with the American Civil Liberties Union, and considered it a most useful and effective organization, and deeply admired Roger N. Baldwin.

After the appointment of these men to these offices the program of legislation which had been sponsored by the American Civil Liberties Union was consolidated into a bill known as the Wheeler-Howard Act. At that time Senator Burton K. Wheeler was chairman of the Senate Indian Committee, and a Mr. Howard, of Nebraska, was chairman of the House Indian Affairs Committee. They introduced the bill at the request of the Department.

Senator NEELY. Did you ever ascertain whether Collier was a member of the American Civil Liberties Union?

Mrs. JEMISON. From his own testimony.

Senator NEELY. When was that given?

Mrs. JEMISON. That was before the Murdock subcommittee. He said he didn't know whether he was a member or not. He said that he thought his name had been on their letterheads, and he thought he had contributed some money to them, but he was not sure. He said if he had not contributed any money he was sorry he did not have it to give to them.

That the so-called Wheeler-Howard Act was not written by Senator Wheeler nor Congressman Howard, but by Nathan Margold and John Collier, as Mr. Collier stated to the Indians in Miami, Okla., in 1934, and as he stated in substance to the Murdock subcommittee in 1935. A comparison of the program of the American Civil Liberties Union which they had sponsored for the Indians and the so-called Wheeler-Howard Act definitely shows that the program of the American Civil Liberties Union was the father of the Wheeler-Howard Act.

I heard Senator Wheeler say in open committee meeting in 1937 that he introduced it without ever reading the bill; that it was brought to him by the department, and they asked him to introduce it that day, and he said he must read it first. They said, "No; introduce it today, because there is a political attack coming off on that, and we must have it in the Senate today." Since that time Senator Wheeler has introduced a bill to repeal that.

Senator McCARRAN. Nearly all the Senators from western States want to repeal that act.

Mrs. JEMISON. They took all the Indians from their own States. The Wheeler-Howard Act was greatly amended in the committee, but nevertheless it never lost its communistic provisions. The first section

says that hereafter there shall be no more allotment of land for the Indians, but that they shall hold all property in common. That is a destruction of the right of private property. The act provided that the Indians should organize into federations and should hold title to all the property on the reservation, and should operate as a Federal corporation. That was the purpose of it.

The act said the Indians should have their choice as to whether they would come under its provisions or not, and that an election should be held. I don't want to take up the time to tell you the terrific campaign that has been put on by the Indian Bureau to put that act over on the Indians. In the first place, it said that a majority of all adult Indians living on the reservation must vote against the provisions of the act before they could be excluded. The Bureau conducted all the elections, made the poll lists, held the elections, and the Indians had nothing to say about it.

On the Santa Isabel Reservation they had a poll list of 122 voters. There were 45 Indians who had been absent from that reservation from 2 to 45 years apiece. There were eight who were unknown to the Santa Isabel Indians on the reservations. There were listed some Indians who were not members of that band but who were residing there. They had the right to vote on that question. They were members who lived on that reservation, about 16 of them, who were not on the poll list and could not vote.

When the ballots were cast there were 45 against the act and 9 for it, including the absentee ballots. The Indians at Santa Isabel had excluded themselves from the Wheeler-Howard Act, but they were informed by the superintendent that Mr. Collier said they were included under the act, because 45 did not constitute a majority of the 122 on the poll list. That matter was brought to the attention of the Murdock subcommittee in 1935, as a result of which the act was amended so that in all elections held under that act it shall be a majority of the votes cast at the election.

Senator NEELY. Will you permit me to ask you a question?

Mrs. JEMISON. Yes, sir.

Senator NEELY. What was Dr. Frankfurter's connection with any of these matters about which you have testified?

Mrs. JEMISON. Dr. Frankfurter is a member of that organization, the American Civil Liberties Union. That program which the Indian Bureau is putting over on the Indians at the expense of the taxpayers was characterized in 1935 in an article in Liberty magazine by Robert Gessner as being a program of community living for the Indians. In other words, John Collier says the Indians must keep all their property in common and live on the reservation on a community basis.

Senator NEELY. What did Dr. Frankfurter have to do with that?

Mrs. JEMISON. He must have known about that situation.

Senator NEELY. Suppose he did know about it, would his knowledge constitute guilt of any sort of offense?

Mrs. JEMISON. The American Civil Liberties Union propagandized that bill through the Congress, and it is a program of communism. If he didn't like it, why didn't he get off the committee and denounce it?

Senator NEELY. Have you any evidence that Dr. Frankfurter had any connection with any of the matters you have discussed, aside from

the fact that he was a member of the National Committee of the American Civil Liberties Union?

Mrs. JEMISON. Dr. Frankfurter should know about Indian affairs. During the World War he was in Washington. It was after that time that the American Civil Liberties Union took up the Indian question. I have no doubt that Dr. Frankfurter knows all about the Indian situation.

Senator NEELY. Suppose he does. Should this committee reject him because of that fact?

Mrs. JEMISON. No.

I am trying to add to the record of subversive activities of Dr. Frankfurter which has been built up before you. I am trying to tell you what has happened to the Indians under the legislative program of the American Civil Liberties Union.

Senator NEELY. Members of the subcommittee would like to know whether Dr. Frankfurter was responsible for what has happened. If you have any information on that point please impart it to us. If you are right in saying that the Supreme Court cannot pass upon the constitutionality of laws such as you have discussed, why should you be so eager to disqualify Dr. Frankfurter?

Senator CONNALLY. I cannot accept that statement, Mr. Chairman. She has the right to be concerned as an American on the right of general welfare. I do not go that far with the chairman.

Senator NEELY. The chairman spoke for himself alone. He was trying to ascertain the real motive of the witness in urging that Dr. Frankfurter's nomination be rejected.

Mrs. JEMISON. I represent the native-born Americans, the only ones there are.

Senator NEELY. I do not think that the Indians have been properly treated, and I am very much in sympathy with your desire for justice for those whom you represent. I do not want to restrain you in your testimony, but this is a hearing concerning the qualifications of Dr. Frankfurter, and I hope that your testimony will have some relation to that subject. This committee has no jurisdiction to adjust the controversy between the Indians and the Government of the United States. Our sole object is to determine the fitness of Dr. Frankfurter for membership on the Supreme Court, and I do not think that your testimony has shed a ray of light on that question.

Senator McCARRAN. Her claim is that by reason of the Wheeler-Howard Act the Indians of this country have been communized to a large extent, and that a communistic system has been instituted among the Indians. I take it that her desire is to show that legislation was brought about by the activities of the American Civil Liberties Union, of which Mr. Frankfurter is an active member.

Senator NEELY. Has Senator McCarran correctly expounded your theory?

Mrs. JAMISON. If I may be permitted, I will finish my statement, and show you why I am interested in the Supreme Court.

Senator NEELY. Do you mean to contend that the Civil Liberties Union was responsible for the enactment of the Wheeler-Howard law?

Mrs. JAMISON. I contend that they wrote it, and are responsible for its enactment, and their people are administering it. The Indian

wards of a Christian nation are being communized at the expense of the American public.

Senator NEELY. Mrs. Jamison, you may proceed in your own way, and I shall not interrupt you again.

Mrs. JAMISON. I represent an organization that is seeking their rights in the Supreme Court. Why wouldn't we be interested in who sits on it? I represent the people who helped to form this Nation. I come from the State of New York. My ancestors gave the United States the basic principles on which this Government was founded. We gave it our form of government, which we had lived under for many years before the white man came here. We have participated in every war in defense of this Government, whether we were citizens of this country or not. I have gone hungry in Washington for 4 years and seen my children go to bed hungry fighting this program.

This summer I went out on the reservations in the West. I was out on one reservation for 6 days, and while I was there two people were found starved to death within the very shadow of the agency office. My people are living in great distress out there.

I don't think I will proceed with this testimony. I have given all my testimony before the Dies committee. The entire record is there and will be printed in volume IV. If the committee wants the statement which I prepared for the Dies committee, I will be glad to bring it here. I prepared over 100 pages of legal briefs presenting the argument to show this is a communistic program and is communizing the Indians. I will be very glad to bring over what I filed with Chairman Dies for this committee.

I only want to say that in 1935, when Robert Gessner had the article in Liberty magazine, in which he said that was a program of communism, he said it was a program which might well be presented to the rest of the Americans. The American Civil Liberties Union says it is a program that might well be used by the rest of the Americans, and we do not want it to be used. We believe in the American form of government, and have been fighting for it for the last 5 years in Congress. Before the Dies committee met the first time we had a hearing at which I appeared. We have had many hearings before the Committee on Indian Affairs, and not one has been printed during the last 2 years. The only one was the Murdock committee in 1935. It is time the American public knew these facts and knew what the American Civil Liberties Union is doing to the American Indians today. I still repeat that as a member of the executive committee of the American Civil Liberties Union, Felix Frankfurter is certainly partly responsible for what is being done to my people today.

Senator NEELY. Are there any others present who wish to be heard in opposition to the confirmation of Dr. Frankfurter? If not, we shall hear Mr. Staderman who has requested an opportunity to express his views.

#### STATEMENT OF RICHARD A. STADERMAN, PRESIDENT OF THE AMERICAN GOOD GOVERNMENT SOCIETY OF WASHINGTON, D. C., NEW YORK CITY AND WASHINGTON

Mr. STADERMAN. Mr. Chairman and gentlemen of the committee, my name is Richard A. Staderman, of New York City and Washing-

ton, D. C., representing the American Good Government Society, in which I have the honor to hold the office of president and chairman of the board of governors. I am also editor of the Good Government Review, a magazine.

Mr. Chairman, before proceeding, I wish to request the inclusion of three brief communications in the record, pertaining to the matter at hand and consisting of correspondence between the White House and ourselves and a letter from Professor Frankfurter. I should like also to request that I proceed uninterrupted with my very brief statement, after which I shall be happy to respond to any questions the committee may propound.

Senator NEELY. The communications will be inserted in the record at the close of your statement.

Mr. STADERMAN. Mr. Chairman, our organization, the American Good Government Society, is national and nonpartisan in character, with headquarters here in Washington, D. C. We are composed of persons in various parts of the United States having an independent outlook and desiring to retain and improve our American way of government under safe, sane, and constitutional methods.

We have three principal activities, first, that of the usual so-called learned society of fostering contacts and interchange of opinion between forward-looking citizens desiring a happier America; second, we publish the American Good Government Review, a magazine dealing with important national issues and problems; third, we take definite positions on candidates and issues; for example, prior to the recent elections we endorsed over 200 candidates for Governor, United States Senator, and Congress, on the basis of fitness for the office sought. Of these, almost equally divided between the major parties plus several independents, almost 90 percent were successful.

I have given you these details before proceeding to our endorsement of Professor Frankfurter, so that you may know that our opinion is that of an organization of forward-looking but careful citizens having no obligation to special interests and no "axes to grind."

Mr. Chairman, on August 30 last it was my privilege to transmit to President Roosevelt and to Professor Frankfurter our endorsement of him for the Supreme Court vacancy. I have here a copy of our society's resolution as well as the replies from him and the White House, which you are most welcome to read.

Gentlemen, in the minds of many of the general public the recent polls of members of the bar was the most important reason for their approval of his appointment to the Court. They reasoned that if so many members of the bar can ever get together on anything or anybody, he must really be worth while.

With us of the American Good Government Society, however, the poll of lawyers was merely a seconding of our previous view. Our reasoning endeavored to take into account the facts of his career as well as the healthiness of his mental outlook.

Felix Frankfurter was not born with a golden spoon in his mouth. He began his career as an immigrant boy selling newspapers and working his way through New York's City College, thereby starting life without the handicap of shallow superiority complexes.

We all know, of course, with what high honors he was graduated from the law school of Harvard, where he now teaches. What I

should like to emphasize, however, is the variety and breadth of experience Professor Frankfurter has had in Government, a factor vital in obtaining a well-rounded personality for our highest Court. In other words, what we should look for in a Supreme Court Justice is not alone abstract legal ability, but a truly national background of having dealt with many kinds of problems competently. This principle is proven by the outstanding court record of our present Chief Justice, Mr. Hughes.

Felix Frankfurter's ability was early shown by his appointment to what are usually political positions, first under a Republican regime and later under a Democratic one, when he was assistant prosecuting attorney under Colonel Stimson and later a lawyer in the Bureau of Insular Affairs under the same colonel, then serving as Secretary of War. These were Republican regimes. After a return to Harvard law school as professor, he was drawn back to Washington under the Democratic Wilson administration as a confidential assistant to Secretary of War Baker—another distinguished lawyer—where curiously enough an important part of his duties lay in settling strikes and other labor problems engendered by the war and the economic disturbances it caused. This led to his becoming head of a new Labor Policies Board in 1918, where he successfully coped with the problem of shifting millions of men from "unessential" to war industries.

Centuries ago the adroit politician Machiavelli wrote in his book *The Prince* that a leader is judged by his secretary or assistant. If we apply this criterion to Professor Frankfurter, we find hundreds of proteges of his who are doing important and outstanding tasks in business and Government.

One can often be judged by the appointments one refuses, thus his declination of appointments as supreme court justice of Massachusetts and of United States Solicitor General indicated his stature.

Another reason for us of the American Good Government Society to favor Felix Frankfurter lies in his long experience in the neglected realm known as "administrative laws." One of our members is chairman of the committee on administrative law of the American Bar Association and we have become firmly convinced that this difficult subject requires extensive study and concomitant improvement in our administrative agencies of government and court review of same.

It is a truism that justice delayed is not justice at all, and this is especially true of a person aggrieved by an act of an administrative officer. If one must drag through 10 years of court procedure, one may be bankrupted, the Federal employee responsible for the unwise rule may be dead, retired, or resigned. Truly the evil that men do lives after them; yet there is no record of any such unwise bureaucrat ever having been disciplined.

The presence of Professor Frankfurter on the Court would ensure the most informed and mature judgment being passed on cases involving administrative law, which the then president of the American bar, Mr. Vanderbilt, once termed "our government problem."

In his one of many books, *The Public and Its Government*, Professor Frankfurter carefully analyzes the complexity of modern government and advocates the boiling down of emotions and passions into a "contracted area of conflict and a widened area of accredited

knowledge as the basis of actions." Could we have a better display of a judicial temperament?

Before closing, I wish to express the opinion that our Nation is fortunate to have a man of Frankfurter's caliber to accept this nomination. I suspect that he turned down the bid to the Massachusetts high court due to the limitations it would place upon his public activities and utterances.

In view of the almost monastic silence on many topics imposed by the tradition of our United States high court, I feel that it is both a great honor and a great sacrifice for Professor Frankfurter to accept the President's nomination.

I therefore hope that your committee and the entire Senate will take the broad point of view and unanimously confirm the nomination to the Court of Felix Frankfurter—one of the great Americans of our century. I thank you.

(The following exhibits are incorporated in the record as part of the testimony of Richard A. Staderman):

LAW SCHOOL OF HARVARD UNIVERSITY,  
Cambridge, Mass., September 2, 1938.

RICHARD A. STADERMAN, Esq.,  
American Good Government Society,  
Washington, D. C.

MY DEAR MR. STADERMAN: Let me thank you for your letter and its enclosure, and for the generous sentiments which both express.

Yours sincerely,

(Signed) FELIX FRANKFURTER.

THE AMERICAN GOOD GOVERNMENT SOCIETY,  
August 30, 1938.

The Honorable FRANKLIN D. ROOSEVELT,  
The White House.

DEAR PRESIDENT ROOSEVELT: It is an especial pleasure to transmit the following resolution relating to the Supreme Court and to a fellow alumnus of yours and mine:

"The Board of Governors of the American Good Government Society, a national, nonpartisan organization with headquarters in Washington, D. C., has for some time been acquainted with the distinguished record in law and government of Prof. Felix Frankfurter, of the Harvard Law School. Esteemed not only in academic circles but with intensely practical experience as prosecuting attorney and as a high official in various parts of the Federal administration, he, obviously, well rounded, certainly merits the preeminent rating reported in a nationally known poll of members of the bar. The American Good Government Society therefore takes pleasure in endorsing Felix Frankfurter for the seat now vacant on the bench of the United States Supreme Court."

With kind personal regards, I remain,

Yours most cordially,

(Signed) RICHARD A. STADERMAN,  
President and Chairman of the Board of Governors of the  
American Good Government Society.

(Whereupon, at 4:05 p. m., the hearing was closed, and the subcommittee held an executive session, at the conclusion of which an adjournment was taken until the following day, Thursday, January 12, 1939, at 10:30 a. m.)

(A number of communications having been received for and against the confirmation, the subcommittee directed that the names and addresses of the writer, and whether favoring or opposing confirmation, be incorporated in the record. In accordance with that direction, the

following statement was prepared, showing first those favoring confirmation:)

Mrs. Lewis Goldberg, Boston, Mass.  
 Annie May Cullen, New York City.  
 William Richards, Bluefield, W. Va.  
 Harry N. Howard, Oxford, Ohio.  
 Ferdon Shaw, New York City.  
 John H. Light, St. Louis, Mo.  
 Henry Ellenbogen, Pittsburgh, Pa.  
 Jacob Barash, New York City.  
 Ruth Chudnow (no address).  
 Phillip W. Hobart, St. Albans, Vt.  
 Tillie Wolfson, Los Angeles, Calif.

Thomas F. Quinn, Boston, Mass.  
 Edna O. Anderson, Seattle, Wash.  
 Edward L. Corbett, New York City.  
 Russell Olt, Anderson, Indiana.  
 Mr. and Mrs. Adolph Bame, Chicago, Ill.  
 Hugh Gordon Miller, New York City.  
 Unsigned postal card, Brooklyn, N. Y.  
 Louis Dunn, Chicago, Ill.  
 Murray M. Smolar, New York City.  
 Damon E. Hall, Boston, Mass.

(Communications were received from the following opposing confirmation:)

M. Keating, New York City.  
 Henry J. Sullivan, South Boston, Mass.  
 Adrian F. Cary, Catonsville, Ind.  
 F. Rice Smith, Ridgewood, N. J.  
 Frank E. Rowe, Melrose, Mass.  
 Mrs. Dorothy Clark, Hadicker, Bronx, N. Y.

H. A. Jung, Chicago, Ill.  
 Emory C. Gordon, Highland Park, Ill.  
 W. Randolph Angell, Boston, Mass.  
 John P. Pfalsgraf, Brooklyn, N. Y.  
 A. M. Barlow, New York City.  
 J. Syndringham Sears, New York City.  
 W. S. Blake, New York City.  
 Russell McFarland, Adrian, Mich.  
 Mrs. Florence Vasei, New York City.  
 John Smith, New York City.  
 Harold Hassell, New York City.  
 William Edwards, Brooklyn, N. Y.  
 Etta McHugh, Brooklyn, N. Y.  
 Joseph Breier, Washington, D. C.  
 George C. Potts, Lombard, Ill.  
 Mrs. Mae D. Williams, Marshalltown, Iowa.

James Ledbury, Lombard, Ill.  
 Benjamin R. Turner, Boston, Mass.  
 Sara Gordon, New York City.  
 George B. Kinkead, Washington, D. C.  
 J. P. Hartford, New York City.  
 A. Louise Pratt, New York City.  
 Ada A. Pratt, New York City.  
 Irene Lee McCanliss, New York City.  
 Cornelia James Seay, New York City.  
 Albert D. Smith, New York City.  
 M. Fried, Ozone Park, Long Island.  
 Loretta A. Doherty, Brooklyn, N. Y.  
 George Blehl, Union City, N. J.  
 Franklin Dundon, Kew Gardens, N. Y.  
 Miles C. Hayes, Boston, Mass.  
 John W. Brown, Vincennes, Ind.  
 Thomas M. Vinson, Winchester, Mass.  
 Fred Severs, Bronx, N. Y.  
 A Mere Christian American (no address).  
 Bertha J. Froelich and group, New York City.  
 Irene K. Wallace, New York City.  
 Vera Keating, New York City.

American Women Against Communism, New York City.  
 L. Virginia Peed, Palm Beach, Fla.  
 Joseph A. Gagnon, Palm Beach, Fla.  
 E. M. Crocker, Newark, N. J.  
 The Majority of the Voters of the United States, Philadelphia, Pa.  
 Dr. J. S. Skaggs, Montcoal, W. Va.  
 Arthur C. Sundell, Boston, Mass.  
 Adele Zabriskie, New York City.  
 Fred L. Wolf, Detroit, Mich.  
 M. R. White, Uniontown, W. Va.  
 An American, no address.  
 Walter S. Eaton, Augusta, Maine.  
 Mrs. J. Henry Orme, Los Angeles, Calif.  
 Anna B. Sloans, New York City.  
 A. H. Hill, Keystone, W. Va.  
 Charlotte Fox, New York City.  
 One of the 100,000 Americans, no address.  
 C. O. Starr, Philadelphia, Pa.  
 Mrs. Bernard Rodney, Washington, D. C.  
 Mrs. David Johnson, Boston, Mass.  
 Leon Lafleur, Williamansette, Mass.  
 Mrs. Edward N. Dingley, Chevy Chase, Md.  
 E. S. Potter, Brooklyn, N. Y.  
 Two hundred American mothers, Brainerd, Minn.  
 Twenty-five faithful citizens, no address.  
 L. F. Deytsman, Smithtown Branch, N. Y.  
 William F. Fowler, Lynbrook, N. Y.  
 Eugene Hudgins, Brooklyn, N. Y.  
 L. W. Piehn, Sheboygan, Wis.  
 Carroll Tillman, Boston, Mass.  
 R. S. Burruss, Lynchburg, Va.  
 John F. Mitchell, no address.  
 Robert E. Edmondson, Pocono Summit, Pa.  
 David Van Peet, Philadelphia, Pa.  
 T. Lindsay Elder, Greenville, S. C.  
 William W. Watson, Palatka, Fla.  
 American Women Against Communism, New York City.  
 Oscar H. Winn, Little Rock, Ark.  
 Latham R. Reed, Washington, D. C.  
 Mrs. Chas. Feehan, Haverhill, Mass.



Jas. W. Springman, Berwyn, Md.  
Robert F. Ritsche, New York City.  
Marie C. Mack, Ozone Park, Long Island.

Mrs. Mary E. Lovell, Brooklyn, N. Y.  
Mrs. Elise W. Duncan, Pelham Manor, N. Y.

Alexander S. Lanter, Washington, D. C.  
George Wittmer, Jr., Pittsburgh, Pa.  
Mrs. B. M. Frink, Riverdale, N. Y.  
William McCullen, Philadelphia, Pa.  
Mrs. Pearl H. Rushaupt, Los Angeles, Calif.

Wymer Dressler, Omaha, Nebr.  
Mrs. Mary E. Lovell, Brooklyn, N. Y.  
Mr. and Mrs. H. Keavitt and three sons, Los Angeles, Calif.

Frank A. Parker, Riverdale, N. Y.  
Arthur J. Brophy, Harrison, N. J.  
Anna Kayler, Ozone Park, Long Island.  
Mrs. E. Krauss, St. Albans, Long Island.  
Vera Victoria, Cumberland, San Francisco, Calif.

J. E. Stephenson, Indianapolis, Ind.  
Austin Craig, Minneapolis, Minn.  
A. E. Harrington, Wheeling, W. Va.  
B. M. Stanger, Wheeling, W. Va.  
J. A. Kilgour, Sterling, Ill.  
Annie E. Hager, Coraopolis, Pa.  
Eva Condon, Elmhurst, N. Y.  
Unsigned letter, New York City.  
Miles Hayes, Boston, Mass.  
Eldon Blabed, New York City.

Gustave A. Witte, Jr., Mamaroneck, N. Y.

I. Lincoln, Philadelphia, Pa.  
H. A. Walsh, New York City.  
Louise K. Avery, New York City.  
Mrs. J. A. Wilken, New York City.  
Lawrence A. Stone, New Orleans, La.  
John Ohearn family, New York City.  
Mary Madden, Brooklyn, N. Y.  
Marie Madden, Brooklyn, N. Y.  
Alma Madden, Brooklyn, N. Y.  
John Healy, Brooklyn, N. Y.  
Oliver Healy, Brooklyn, N. Y.  
C. P. Baldwin, New York City.  
Catherine Conklin, New York City.  
Helen Rouché, New York City.  
William Henry, New York City.  
Marion Blason, New York City.  
Madeline Blason, New York City.  
Genevieve G. Barton, Brooklyn, N. Y.  
Arthur Allen, New York City.  
Lella Cornell, Doverdam, (no State given).

L. Rosen, New York City.  
Sam Moskowitz, New York City.  
Frederic J. Dwyer, New York City.  
Atlanta Division League of Christian Women, Atlanta, Ga.  
J. G. Maplin, El Paso, Tex.  
Ganson Taggart, Grand Rapids, Mich.  
Four voters, Pelham, N. Y.  
Charles E. Burk, New York City.  
Ernest G. Stevin, Nyassat, N. Y.

(The following communications were received neither favoring nor opposing confirmation, but suggesting a careful investigation into the record of the nominee.)

J. H. Smithson, Washington, D. C. Thomas A. Moran, Boston, Mass.  
W. I. Greenleaf, Jacksonville, Ala.

(A communication was received from Fred G. Clark, national Commander, the Crusaders, stating that the appearing of Collis O. Redd, a witness who appeared before the committee in opposition to the confirmation, had no connection with and was not authorized to speak for the Crusaders.)

(A communication was received from Senator Tydings of Maryland, enclosing a petition opposing confirmation from the following citizens of Baltimore:)

Samuel P. Johnson.  
Phillip R. Sewell.  
M. H. Rogers.  
Arthur Erdman.  
C. Irvin Kellough.  
George A. Oursler.  
Mrs. Clinton Griffin.  
Fred A. Moskam.  
Mary B. Durkee.  
Mary R. Berryman.  
Edward Minnie.

Mary Wiley.  
John A. Stanch.  
Florence M. Stanch.  
Daniel A. McKenna.  
Joseph A. Werb.  
J. H. Godfrey.  
L. P. Griesemer.  
Fred C. Rohlfing.  
Joseph Hassan.  
T. R. Clements.



## NOMINATION OF FELIX FRANKFURTER

THURSDAY, JANUARY 12, 1939

UNITED STATES SENATE,  
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D. C.*

The subcommittee met, pursuant to adjournment, in room 818 Senate Office Building, at 10:30 a. m., Senator M. M. Neely (chairman) presiding.

Present: Senators Neely (chairman), King, McCarran, Connally, Hughes, Borah, Norris, Austin, and Danaher.

Senator NEELEY. The subcommittee will be in order. The audience will please refrain from demonstrations of approval or disapproval.

### STATEMENT OF DR. FELIX FRANKFURTER

Senator NEELEY. Dr. Frankfurter, the subcommittee of the Committee on the Judiciary of the United States Senate, before which your nomination is pending, has invited you here in order that the members of the subcommittee may become acquainted with you. We now welcome you and assure you that we shall be glad to hear any statement that you may care to make.

Have the members of the subcommittee any suggestions?

Senator KING. Mr. Chairman, I suggest that we permit Dr. Frankfurter to make such statement as he desires.

Senator NEELEY. Dr. Frankfurter, you may proceed in your own way.

Dr. FRANKFURTER. Mr. Chairman and gentlemen of the committee, with your permission, in order that there may be no possible doubt as to the words, I have taken the liberty to put on paper a very few remarks in response to your kind invitation to say what I have to say. If I may be permitted, I should like to read it.

Senator NEELEY. That will be entirely satisfactory.

Dr. FRANKFURTER. I am very glad to accede to this committee's desire to have me appear before it. I, of course, do not wish to testify in support of my own nomination. Except only in one instance, involving a charge against a nominee concerning his official act as Attorney General, the entire history of this committee and of the Court does not disclose that a nominee to the Supreme Court has appeared and testified before the Judiciary Committee. While I believe that a nominee's record should be thoroughly scrutinized by this committee, I hope you will not think it presumptuous on my part to suggest that neither such examination nor the best interests of the Supreme Court will be helped by the personal participation of the nominee himself. I should think it improper for a nominee no less than for a member of the Court to express his per-

sonal views on controversial political issues affecting the Court. My attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible. I should think it not only bad taste but inconsistent with the duties of the office for which I have been nominated for me to attempt to supplement my past record by present declarations.

That is all I have to say.

Senator NEELY. The opportunity is now afforded members of the subcommittee to ask Dr. Frankfurter any questions they may desire to propound.

Senator BORAH, do you care to ask any questions?

Senator BORAH. I was not present yesterday evening when a woman testified with reference to some transaction connected with Indian Affairs, with which Dr. Frankfurter was supposed to have been associated in some way. I would like to know the facts about that, because it apparently involves some question of integrity.

Senator NEELY. Mrs. Jemison, who appeared in behalf of an organization of Indians, testified in effect that she felt that the American Civil Liberties Union had been responsible in some way for the enactment of the so-called Wheeler-Howard law, and that under that law certain Indian tribes, if not all Indian tribes, had been socialized or communized. Although it did not appear to the Chair that she even remotely connected Dr. Frankfurter with the matter, she seemed to think because he had been a member of the National Committee of the American Civil Liberties Union, that he was in some way responsible for the enactment and probably the enforcement of the Wheeler-Howard Act.

If this is not an accurate epitomization of her testimony, I hope some other member of the subcommittee who was present will correct it or supplement it.

Senator BORAH. If that is a correct interpretation of the testimony, I do not care to ask any questions about it.

Dr. Frankfurter, how long were you a member of the National Committee of the American Civil Liberties Union?

Dr. FRANKFURTER. The American Civil Liberties Union, I believe—and I am relying upon my memory with no verification in mind, Senator Borah, because the kind invitation of the committee came to me last night and there was no time to look up records, nor did I know the course the questions might take—but the union, as perhaps the senior members of the committee may recall, was organized after the war for the protection of rights guaranteed under the Constitution. I do not know whether it was 1919 or 1920, but it was not long after the war. I have been a member of the general national committee since that time along with—and I am again guessing—perhaps 100 representatives men and women throughout the country. I have been on that committee continuously since 1919 or 1920, whichever it was.

Senator BORAH. What were your duties? What part did you take in the activities of the American Civil Liberties Union?

Dr. FRANKFURTER. Perhaps in the interest of time, I might set forth my whole relation to the union.

Senator BORAH. I think that would be proper.

Dr. FRANKFURTER. If I refer to matters connected with my own history, it will be necessary to do so in order that you may know

the facts and the objectives of the union, and I trust the committee will forgive me for personal references.

I was a law officer of the United States Government, to be sure, in a minor capacity, from 1906 to 1914. From 1906 to 1911, in particular, I became intimately familiar, as an Assistant United States Attorney, and a Special Assistant to the Attorney General during the administrations of President Theodore Roosevelt and President Taft, with the processes of criminal justice in their various applications.

If I may say so, my chief, the then United States Attorney Stimson, inculcated in all his assistants a very high and fastidious sense of obedience to the Constitution and laws of this country, and more particularly he insisted that law officers should be the most consistent observers of the law.

After the war was over, as the gentlemen of the committee will remember, as happens so often after serious dislocation of customs and habits, there was a great deal of hysteria in different parts of the country, a great deal of excitement, some of which resulted in episodes, and more than episodes, not the most edifying in the history of our country.

In some instances these resulted in disregard of the Constitution and statutes of the United States, to which eminent lawyers and judges called attention at the time, including, if I may refresh your recollection, the present Chief Justice of the United States, in connection with the unseating of certain Socialist members of the New York Legislature. Without previous knowledge on my part of his intentions, Judge George W. Anderson, then of the Federal district court and later of the Court of Appeals in the First Circuit, asked me to serve as *amicus curia* to participate in certain proceedings which were brought in the District Court for the Massachusetts District involving habeas corpus for the release of some score of aliens sought to be deported by the Department of Labor, and involving illegalities by the Departments of Labor and Justice and violations of the Bill of Rights.

The case was *Colyer v. Skeffington* (265 Fed. 17), in which Judge Anderson wrote a long opinion, pointing out in detail the illegalities of which then members of the Department of Justice had been guilty. Perhaps my recollection of the case is best set forth in the language of Judge Anderson, and, with your permission, I should like to read it. The portion of the opinion to which I wish to call your attention is as follows (pp. 21-22):

Their (the petitioner's) counsel have also had the assistance of Prof. Felix Frankfurter and Zechariah Chafee, Jr., of the Harvard Law School, who, as amici curiae, have appeared in association with counsel for the petitioners and assisted both in the presentation of the evidence and in the argument of controlling questions of law.

I trust you will forgive me if I read the next paragraph:

I desire to express my appreciation of their unselfish and highly professional endeavors to assist in the proper determination of a cause involving directly the fundamental rights of a large number of aliens but poorly equipped with means or knowledge to protect their rights, and, indirectly, questions of far-reaching and general importance to all, whether citizens or aliens.

I speak of all this because it is the beginning of my interest and relations with the American Civil Liberties Union. I ought to say in the interest of completeness that Judge Anderson issued writs of habeas corpus in the case of these petitioners and the Government appealed only in 3 or 4 cases out of the 20.

It took an appeal on an abstract question of law and left unchallenged the matter of violation of various portion of the Bill of Rights, which Judge Anderson found.

That proceeding, with like proceedings in various other districts throughout the country, may or may not have been brought to the attention of this committee.

May I say in passing that I have no knowledge of all the things which have taken place before this committee, except such meager reports in the press as were accessible to me, and I trust you will not deem me neglectful when I say I read them very hurriedly because of the limitations of time. These meager press accounts and such summaries as Mr. Acheson thought proper to give me, do not enable me to know whether a report on the illegal practices of the Department of Justice in 1920 was submitted to this committee. That was signed by a dozen lawyers scattered throughout the country, of whom I was one. Among the signers were Dean Roscoe Pound; Francis Fisher Kane, who at one time was United States attorney; F. Holmes (?), of Philadelphia; Jackson H. Ralston, of Washington; Frank P. Walsh, of New York City; and Tyrrell Williams, of St. Louis.

That report generalized the specific instances found by Judge Anderson in the *Steffington* case. They had been disclosed in various parts of the country. I can best indicate the nature of the report by reading a few sentences from the present Chief Justice, who was then a practicing lawyer, in a reference made shortly after the issuance of the report.

Mr. Charles Evans Hughes, in June 1920, made a public address. It so happened that it was in the Harvard Law School, but was widely reported at the time, from which I quote the following:

Very recently information has been laid by responsible citizens at the bar of public opinion of violations of personal rights which savor of the worst practices of tyranny.

And later, speaking of the same situations, of the same instances of illegalities, one of the most distinguished lawyers of the land, Moorfield (?) Storey, wrote as follows:

On a small scale, a "reign of terror" (was produced) in which some thousands of innocent people were cruelly treated and exposed to much suffering and loss.

The statements in the newspapers were false and misleading. There was no conspiracy to overthrow this Government, and no evidence was ever produced which excused the action of the Government. The safeguards of the Constitution were ignored, and any true American must blush at what was done, and at the indifference in which he and all but a handful of his countrymen tolerated it.

That is the background of the situation, from which came my connection with the Civil Liberties Union, and the conditions summarized in the statements of Hughes and Storey. I do not recall the exact terms or even the persons through whom came the invitation to join a national body that deemed its special task the enforcement of the Bill of Rights; at least, to help people who claimed that the Bill of Rights was not being enforced in their belief through advice or such other means as a lawyers' committee might afford. I am not sure, because this goes back 20 years, but I would not be surprised if Mr. Roger Baldwin himself, either in person or through letter, had asked me if I would be one of the group of people who

would lend their moral support, if I may so characterize it, in relation to this problem, to the vital necessity of securing enforcement of the Bill of Rights, not abstractly but in practice.

There is one other matter I might mention, in the interest of completeness, which made a great impression on me. In a speech by the late Senator Beveridge, whose friendship I had the honor to enjoy, before the American Bar Association in 1902, he stated in effect that he was, of course, a staunch defender of the Constitution, a supporter of the document that established this country and maintained it, but he was in favor of supporting the Constitution as a whole and not selectively. I was then 20 years younger than I am now, and this address and attitude by Beveridge made an even greater impression upon me than it would now.

May I say that from my experience as a prosecutor I knew of the terrible instruments placed in the hands of a prosecutor. I know the temptations which sometimes arise in the exercise or use of those instruments. I know, too, the great importance of having a group of people whose special job it should be to be watchful that the Bill of Rights should be defended in case it is invoked.

During that period my relations to the American Civil Liberties Union have been in that generalized fashion. I have not appeared in any of its litigation. I think I am correct in saying that I have never attended a meeting of the Union, never been an officer or member of the executive committee. I do not mean to imply any criticism of any of their activities, but to establish the exact scope and limit of my relations. I have been consulted from time to time by lawyers upon major issues. Let me give you one or two instances of the kind of participation I have had in the work of the American Civil Liberties Union.

Again I do not know what document or evidence has been submitted to this committee as to the actual activities of the American Civil Liberties Union, but some time ago a case arose regarding the participation of the union in the defense of certain members of the Ku Klux Klan in certain parts of the country who were denied what they claimed were their constitutional rights. I do not want to fix the exact date, but it was about the time of the Ku Klux movement, which was then more popular than it is now.

In my neighboring city of Boston, because I live in Cambridge, there was an attempt to hold a meeting and a parade, and that was sought to be stopped by officials. The issue was the right of assembly. I was consulted, and I said: "Of course, civil liberty means liberty for those whom we do not like or even detest." So when that issue came up, of course, they certainly must invoke the Bill of Rights and the union must give exactly the same help to any member of the Ku Klux Klan who claimed his constitutional rights were infringed as to a member of any labor union or anyone else.

Beginning with the rise in power of the present government in Germany there came before the American Civil Liberties Union another question, to which the union gave its aid and advice through counsel, to those who professed allegiance to the Nazi regime or Nazi theories. I was consulted and said in effect: "I am quite sure about it. If either a Nazi or non-Nazi claims rights under the Constitution, it is for the courts to decide whether he has them or not. The courts cannot decide such questions unless the claims are properly

presented. It makes no difference, so far as the purposes of the union are concerned, whether the particular person who invokes the Bill of Rights does so for reasons which may be deemed inimical to the practices and customs of this country; so long as he keeps within the Bill of Rights, he is entitled to adequate legal representation, to assert his rights in court." That is applied not only to Nazis and to Klausmen, but it is applied to those who profess allegiance to any other regime. That has not only had my hearty approval, but I should have thought the union was departing from its principles and purposes if it had not taken the position which I believe it has taken whenever called upon to enforce the Bill of Rights—I mean vindication of the safeguards in the Constitution for freedom of speech, freedom of the press, freedom of assembly, and freedom of worshiping whichever way conscience dictates.

Since the Wagner Act and the National Labor Relations Board have been in existence, another type of question has come before the union, in which I have not been consulted, but concerning which I have some knowledge. Several cases have been, and I believe are now, before the National Labor Relations Board involving the circulation by employers of certain statements to employees, and rulings have been made. What they were I naturally cannot talk about, but they involved the exercise of the right by employers to circularize their employees. In those instances the American Civil Liberties Union has protested. I am not now concerned with the rightness or the wrongness of that protest. I am trying to define the activities of the union. They protested against action of the Labor Board which appeared to be an invasion of the rights of the employer.

I was consulted on another matter that has perhaps a somewhat droll interest. I believe there has appeared before this committee a witness named Mrs. Dilling. I believe she had been engaged in broadcasting from time to time, and in one of her broadcasts made some remark about, I think, a Methodist bishop, but, at any rate, one of the Protestant faith, that was deemed to be objectionable. The American Civil Liberties Union protested against the denial of broadcasting facilities to Mrs. Dilling, in broadcasting views which were not to the liking of the officers of the union, but did involve this abstract question of the right of people to avail themselves of the guarantee of the Constitution, so long as they kept within the limits of its guarantees.

I think I have perhaps made a sufficient answer to your question, but I am quite agreeable to further questions.

Senator BORAH. What has been the relationship of the American Civil Liberties Union to communism in this country, or the advocacy of communism, or the promotion of it, in any way that you know of?

Dr. FRANKFURTER. I am speaking to lawyers, and, therefore, may be pardoned for the use of technical terms. The American Civil Liberties Union would be guilty of the most inexcusable ultra vires if it had any relation to political views, to political parties, or any faction of any political parties. Therefore, so far as I know, it has no relation to communism, except that if a Communist claimed the protection of the Constitution the American Civil Liberties Union would be within its rights and duty to see that he got that constitutional protection, in the same way in which the union insisted upon Mrs. Dilling having her rights, so far as she claimed rights under



the Constitution; and in the instance in which the union protested against what it deemed were restrictions upon the rights of Mr. Ford in connection with certain matters arising before the National Labor Relations Board. If I may say so, Senator Borah, it makes no difference whether a man is a Communist or a Republican or Progressive or Democrat, he is entitled to the protection of the American Civil Liberties Union in the way which I have outlined. So far as I know, it has not taken any action of the kind to which you have referred, because it could not.

Senator BORAH. How long, if you are informed, was William Z. Foster, late Communist candidate for President, a member of the American Civil Liberties Union?

Dr. FRANKFURTER. I am sorry, sir. I am not informed. I do not know how long he was a member.

Senator BORAH. In any of your writings have you covered the subject of communism or made any reference to it?

Dr. FRANKFURTER. I wrote a book which comprised a series of lectures at Yale University, in 1930, called *The Public and Its Government*. In the last chapter of that book I dealt with my views, as I then expressed them, regarding the nature of democracy; and my beliefs, as I then expressed them, upon some political questions. I do not recall at the moment, Senator Borah, that I dealt with that particular subject. I would not be likely to deal with it, because I confined myself rigorously to legal matters. I have never dealt with political theories as such, and have never been called upon to write about abstract questions of government, except insofar as in that book my feelings are set forth; and I should suppose that my general attitude toward the system of society in which I believe permeates everything I have written.

Senator BORAH. You were appointed by President Wilson as attorney in connection with some matters that arose in California, with reference to the deportation of certain citizens, and also with reference to the *Mooney case*.

Dr. FRANKFURTER. Yes.

Senator BORAH. In what capacity did you serve?

Dr. FRANKFURTER. I was secretary and counsel of a board appointed by President Wilson, called the President's Mediation Committee, of which the then Secretary of Labor was chairman, and on which there were two representatives of the employers and two representatives of the employees. I acted both as secretary and counsel for that committee.

Senator BORAH. What were your duties and what did you do?

Dr. FRANKFURTER. The Commission was appointed by President Wilson primarily to settle two or three then pending strikes, which were of great importance to the production of war materials. One was a strike in the Arizona copper mines, another was a strike in the oil fields of southern California, and another strike in the spruce fields of Washington, spruce having been indispensable in the production of airplanes.

Mr. Acheson calls my attention to the fact that in the report of the Secretary of Labor for 1918 there is a statement of why the Commission was created.

Senator BORAH. Who was Secretary of Labor at that time?

Dr. FRANKFURTER. William B. Wilson.

We had a session with the President in which he told us what he wanted us to do and why he had appointed me. That was in August or September of 1917. I am now speaking from memory of events of 21 years ago. I suppose at this late date it is proper to state a conversation with the President of the United States. I will try to keep within the fastidious restrictions which cover such conversations.

Toward the end of that session President Wilson said: "There is one final matter for this Commission to look into, which is a very disturbing matter. That is the *Mooney case*." Then he said, "Mr. Frankfurter, as the lawyer of the Commission, it will be your special task to charge yourself with inquiring into that case." I, of course, said: "Very well, sir." But it was not until after I left the White House that I asked what the *Mooney case* was, for that was the first time I had heard of it. That is the origin of my official duties in connection with the *Mooney case*. I really did not know at first whether his name was spelled Mooney or Muni. I had to ask. That was because shortly after the war started I was sent abroad for the Government.

Naturally, as the lawyer of the Commission, I discharged as best I could the duties the President had imposed upon the Commission, and my particular task was, of course, to read the record, assemble all the documents, and by that time it was already a sizeable record. We spent much more time in Arizona than we had anticipated in settling the copper strike, and some time in southern California on the oil situation.

In the meantime, there was a strike on the coast involving the telephone companies, and that entailed considerable time and energy, and there was this delay in getting to the *Mooney case*.

In San Francisco it fell to me to do all of the preliminary work, and that matter, unless you feel I should go into it, I will not detail to you, in the interest of time. I saw all the people I thought it was necessary to see, the counsel on both sides, the prosecutor, the attorney general, the counsel for Mooney. I had great help from Archbishop Hanna, he was very helpful. I am stating matters which were made public, some finally set forth in great detail. I also had the privilege of seeing the members of the Supreme Court of California, because a lot of technical California legal questions were involved.

The upshot of it, Mr. Chairman, was a report, which, naturally, the counsel for the commission drafted in the first instance, but which was gone over, not only word for word, but comma for comma, by the members of the commission. This is the report which the late Secretary Wilson, whom I believe to be one of the most conscientious officials who ever occupied office in the United States, made to the President. As I say, that was gone over word for word, comma for comma, by the commission, and was finally transmitted to the President on January 16, 1918. I appeal to the judgment of the chairman as to whether that should go into the record or not. It is really a short report, covering less than two pages in the old Official Bulletin.

Senator NEELY. Without objection, it will be inserted in the record. (The document referred to is here set forth in full, as follows:)

**REPORT ON THE MOONEY DYNAMITE CASES IN SAN FRANCISCO SUBMITTED BY  
PRESIDENT WILSON'S MEDIATION COMMISSION**

Following is the report on the Mooney cases by the President's Mediation Commission to the President of the United States:

WASHINGTON, D. C., January 16, 1918.

The PRESIDENT: Agreeable to your instructions, your Mediation Commission, informally and without publicity, inquired into the circumstances attending the *Mooney case*, and herewith begs to report the result of its investigation.

1. On July 22, 1910, while the San Francisco preparedness parade was in early progress, an explosion occurred on one of the city's side streets filled with paraders and the public. Without question, the explosion was murder designed on a large scale and its purpose was effectuated. Six people were killed outright and about 40 were wounded, of whom 3 or 4 subsequently died. Indisputably a most heinous crime had been committed. The identification of its perpetrators alone had to be established.

**THREATENING LETTERS RECEIVED**

2. The community was deeply stirred. Aggressive activity was at once taken by the police department, and the press was filled with clues and theories for the solution of the tragic mystery. No premonitory acts furnished a clue, except that a number of letters were mailed prior to the parade to prominent citizens and leaders in the movement for the parade, threatening destruction if the parade be undertaken. These letters undoubtedly had a common source. They all avowed pacifist purposes of threats of violence against such manifestations of "militarism" as a preparedness parade was conceived by them to be. The public authorities, however, did not deem these letters significant and the identity of their writers has never been established.

3. The police and the district attorney turned for examination to a different quarter. Arrests were made of Thomas J. Mooney and his wife, Rena Mooney, Warren K. Billings, Israel Weinberg, and Edward D. Nolan.

**ANTECEDENTS OF PERSONS ARRESTED**

4. The antecedents of these five persons, particularly Thomas J. Mooney, have occasioned the war importance of the case. Mooney at the time of his arrest was a well-known labor radical on the Pacific coast. He associated with anarchists. He was a believer in "direct action" in labor controversies. He had once been indicted for attempted dynamiting of property of a San Francisco utility, but after three trials was acquitted. In the spring of 1910 Mooney and his wife were leaders in a bitter and unsuccessful fight to organize the carmen of the United Railroads of San Francisco. Only shortly before the preparedness parade explosion it was sought to connect Mooney with the recent dynamiting of towers of the Pacific Gas & Electric Co. In a word, there can be no doubt that Mooney was regarded as a labor agitator of malevolence by the utilities of San Francisco, and that he was the special object of their opposition. Mrs. Mooney, a music teacher respected by a wide circle of pupils, was sympathetic with his general social views. Billings, a youth touched by radical propaganda, was one of Mooney's friends. He, too, was a believer in "direct action." He had been previously convicted of carrying explosives on a passenger car. Weinberg, whose son was a pupil of Mrs. Mooney, was a jitney-bus driver who had occasionally driven the Mooneys. Nolan was a radical labor leader of some prominence and a friend of Mooney's. Mooney is the center of the case; the other defendants have significance only because of relation to him.

**PEOULIAR ELEMENTS IN CASE**

5. The utilities against which Mooney directed his agitation, or who suspected him of mischievous activity, undoubtedly sought "to get" Mooney. Their activities against him were directed by Swanson, a private detective. It was Swanson who had engineered the investigation which resulted in Mooney's prosecution. It was Swanson who was active in attempts to implicate Mooney in the dynamiting of the electric towers in 1910, attempts which failed, it appears, because Billings and Weinberg refused offers of "reward" by Swanson to implicate Mooney. Shortly thereafter the preparedness parade explosion

occurs. Immediately Swanson took a leading part, now acting for the district attorney and the police, in the investigation of the crime. Within 4 days, under Swanson's leadership, the arrest of Mooney and the others is made.

6. Instead of an ordinary criminal case, or even a case of extraordinary interest, there thus emerge the elements of a clash of forces of wide significance. On the one hand, a community long in the grip of bitter labor struggles is outraged by peculiarly wicked murders. Accusation is made against a group whose leader has been widely associated with views which justify violence at least in industrial conflict. The public mind was therefore easily aroused to belief in the guilt of the accused. The attitude of passion was stimulated by all the arts of modern journalism. It is not surprising, then, that Billings and Mooney were tried in an impregnable atmosphere of guilt.

On the other hand, just as Mooney symbolized labor for all the bitter opponents of organized labor, so he came to symbolize labor, irrespective of his personal merits, in the minds of workers and of their sympathizers. The Mooney case soon resolved itself into a new aspect of an old industrial feud instead of a subject demanding calm search of truth.

7. Billings was tried first, undoubtedly in the hope that the pressure of conviction would lead him to implicate Mooney. He was convicted. His conviction has been sustained. He has been sentenced to life imprisonment. He has not implicated Mooney and he protests innocence. Mooney was tried early in January 1917 and in February 1917 convicted of murder in the first degree. Mrs. Mooney was tried and acquitted. Weinberg was recently tried and acquitted. Nolan has never been put to trial.

#### DEVELOPMENTS AFTER CONVICTION

8. The conviction of Billings and Mooney followed trials in accordance with the established course of American procedure. It is familiar to students of jurisprudence that no system of criminal administration in the world hedges such safeguards around an accused as does an American trial. The conviction, in other words, was based on evidence narrowly confined to the specific issues. Furthermore, proof of guilt had to be established beyond a reasonable doubt, and established to the unanimous satisfaction of a jury of 12 persons selected from among the people. Conviction by an American jury is guilt determined by a very democratic institution. There is no question but that the jury acted in good faith upon the evidence as it was submitted. It is because of subsequent developments that doubt is based upon the justice of the convictions. Following the trials of Billings and Mooney there was a change in the evidence which not only resulted in the acquittal of Mrs. Mooney and Weinberg but also cast doubt upon the prior convictions of Billings and Mooney.

Thus it is that the evidence submitted on the four trials taken together, aimed as it was at the establishment of a single issue, their joint participation in the crime, leaves the mind in the greatest uncertainty as to the complicity of the accused. While each record in itself presents evidence which would justify an appellate court in sustaining the verdict of a jury, the evidence of the four cases in their entirety must shake the confidence in the justice of the convictions. This is due to the dubious character of the witnesses, the subsequent revelations concerning them, and the conflict in the testimony of the same witnesses as the need for change in the testimony developed to fit new theories of the prosecution or new evidence by the defense. But it was not deemed the province of your Commission to establish the guilt or innocence of Mooney and his associates. We conceived it to be our duty merely to determine whether a solid basis exists for a feeling that an injustice was done, or may have been done, in the convictions that were obtained, and that an irreparable injustice would be committed to allow such convictions to proceed to execution.

#### FIND GROUND FOR DISQUIETUDE

9. We find in the atmosphere surrounding the prosecution and trial of the case ground for disquietude. This feeling is reinforced by one factor of controlling importance. The most damaging testimony produced against Mooney came from a witness named Oxman. It was Oxman who testified with convincing detail to the presence of Mooney and Billings at a place and at a time where it was essential for them to have been if proof of their participation in the crime was to be established. After Mooney's conviction there came to light letters confessedly written by Oxman prior to his having been called to testify.

The plain import of these letters is an attempt by Oxman to suborn perjury in corroboration of the vital testimony which he was to give and which, in fact, he did give against Mooney. It is true that Oxman was tried for attempted subornation of perjury and acquitted, but this is beside the present consideration. The fact is that he did write letters which tend completely to discredit any testimony he might give and no testimony from Oxman in the light of these letters would receive credence necessary to lead to conviction. In fact, after the exposure of Oxman, the district attorney did not call him, though available, as a witness in the trial of Mrs. Mooney. When Oxman was discredited the verdict against Mooney was discredited.

#### ACTION OF THE TRIAL JUDGE

10. As soon as the Oxman letters were disclosed, the judge who presided at Mooney's trial called upon the attorney general of California to take steps toward a retrial of the case. We quote from Judge Griffin's letter to Attorney General Webb:

"As you will at once see, they (the Oxman letters) bear directly upon the credibility of the witness and go to the very foundation of the truth of the story told by Oxman on the witness stand. Had they been before me at the time of the hearing of the motion for new trial, I would unhesitatingly have granted it. Unfortunately the matter is now out of my hands, jurisdictionally, and I am, therefore, addressing you, as the representative of the people on the appeal, to urge upon you the necessity of such action on your part as will result in returning the case to this court for retrial. The letters of Oxman undoubtedly require explanation, and, so far as Mooney is concerned, unquestionably the explanation should be heard by a jury which passed upon the question of his guilt or innocence. I fully appreciate the unusual character of such a request coming from the trial court in any case, and I know of no precedent therefor. In the circumstances of this case, I believe that all of us who were participants in the trial concur that right and justice demand that a new trial of Mooney should be had in order that no possible mistake shall be made in a case where a human life is at stake."

#### PRESENT STATUS OF CASE

The attorney general asked the Supreme Court that, in view of the Oxman exposure, the case should be returned to the trial court for a new trial. The supreme court, however, under the laws of California, found itself without jurisdiction to consider matters outside the record. The case is now before that court on appeal, to be disposed of solely on errors appearing from the record of the trial. If the supreme court finds that the record discloses no reversible error, and therefore confirms the conviction, the relief will have to be supplied through the executive action of the Governor of California and the cooperation of the prosecuting officers.

11. Such relief it is hoped will be forthcoming. It is now well known that the attention to the situation in the East was first aroused through meetings of protest against the Mooney conviction in Russia. From Russia and the western States protest spread to the entire country until it has gathered momentum from many sources, sources whose opposition to violence is unquestioned, whose devotion to our cause in the war is unstinted. The liberal sentiment of Russia was aroused, the liberal sentiment of the United States was aroused, because the circumstances of Mooney's prosecution, in the light of his history, led to the belief that the terrible and secret instruments of criminal justice were consciously or unconsciously made use of against labor by its enemies in an industrial conflict.

12. However strange or however unexpected it may be, the just disposition of the Mooney case thus affects influences far beyond the confines of California, and California can be depended upon to see the wider implications of the case. With the mere local aspects, with the political and journalistic conflicts which the case has occasioned, neither the commission nor the country at large is concerned. But the feeling of disquietude aroused by the case must be heeded, for if unchecked, it impairs the faith that our democracy protects the lowliest and even the unworthy against false accusations. War is fought with moral as well as material resources. We are in this war to vindicate the moral claims of unstained processes of law, however slow at times, such processes may be. These claims must be tempered by the fire of our own devotion to them at home.

## RECOMMENDATIONS OF COMMISSION

18. Your Commission, therefore respectfully recommends in case the Supreme Court of California should find it necessary (confined as it is by jurisdictional limitations) to sustain the conviction of Mooney on the record of the trial, that the President use his good offices to invoke action by the Governor of California and the cooperation of its prosecuting attorney to the end that a new trial may be had for Mooney whereby guilt or innocence may be put to the test of unquestionable justice. This result can easily be accomplished by postponing the execution of the sentence of Mooney to await the outcome of a new trial, based upon prosecution under one of the untried indictments against him.

Respectfully submitted.

W. B. WILSON,  
Chairman.  
J. L. SPANGLER,  
E. P. MARSH,  
VERNER Z. REED,  
JOHN H. WALKER,  
FELIX FRANKFURTER,  
Secretary and Counsel.  
MAX LOWENTHAL,  
Assistant Secretary.

Dr. FRANKFURTER. That was the origin, Senator Borah, of my connection with the *Mooney case*, undertaken entirely at the direction of the President of the United States, and in discharge of my obligation of the duty he imposed on me.

I think you referred also, Senator Borah, to the Bisbee deportations. That followed the procedure of the Mooney report, and, with your permission, perhaps that report should also go in the record. It is also addressed to the President, under date of November 6, 1917. The work I did in that connection was the work of the counsel of the Commission.

Senator NEELY. Without objection, it may be inserted in the record. (The document referred to is here set forth in full, as follows:)

REPORT ON BISBEE DEPORTATIONS MADE BY THE PRESIDENT'S MEDIATION COMMISSION TO THE PRESIDENT OF THE UNITED STATES

BISBEE, ARIZ., November 6, 1917.

The PRESIDENT:

The deportations on the 12th of July last, from the Warren district of Arizona, as well as the practices that followed such deportations, have deeply affected the opinions of laboring men, as well as the general public, throughout the country. These events have even been made the basis of an attempt to affect adversely public opinion among some of the people of the Allies. Their memory still embarrasses the establishment of industrial peace for the period of the war, and it is indispensable to obtain and maintain industrial peace if the war is to be brought to the quickest possible successful conclusion and if lives are not to be needlessly sacrificed. The President's Mediation Commission is charged, rather with helping to secure peaceful industrial relations for the future than to sit in judgment upon the errors of the past. But it is impossible to make for peace in the future unless the recurrences of such instances as the Bisbee deportations are avoided. The future cannot be safeguarded against such recurrences unless a candid and just statement is made of the facts surrounding the Bisbee deportation and an understanding is had of the conditions which brought it about. Such candor is necessary for the guidance of all in their future conduct. Such candor is also necessary, because if the truth be authoritatively set forth there will be no basis for any misrepresentation of the facts either through ignorance or design.

The President's Mediation Commission has therefore deemed it a duty which it could not avoid to undertake a thorough and impartial consideration of the facts surrounding the deportations of the 12th of July and the practices which have been pursued since the deportation by officials and citizens of Cochise County. After hearing the representatives of the different elements involved

in the deportation, both official and private, the President's Mediation Commission makes these findings:

1. A strike was called in the Warren district on June 23, 1917, to be effective the following day. While undoubtedly the men sincerely felt that several grievances called for rectification by the companies, having regard to the conditions in this district and the Government's need for its copper production, the grievances were not of such a nature as to have justified the strike. Here, as elsewhere, there was, however, no machinery for the adjustment of difficulties between the companies and the men which provided for the determination of alleged grievances by some authoritative disinterested tribunal in which both the companies and the men had confidence and before which they had an equal opportunity of urging their respective claims. This is a fundamental difficulty in the settlement of grievances that may arise in this district, and here as in the other mining camps in Arizona visited by the President's Mediation Commission a plan has been worked out establishing such machinery whereby in the future, at least during the period of the war, grievances will be settled by an orderly, impartial process, and the resort to strike or lock-out will be wholly without foundation.

2. Many of those who went out did not in fact believe in the justice of the strike but supported it, as is common among workmen, because of their general loyalty to the cause represented by the strikers and their refusal to be regarded in their own estimation, as well as in the minds of their fellow workers, as "scabs."

3. Shortly after the strike was called the sheriff of the county, through the Governor of Arizona, requested the aid of Federal troops. The request was based on the fact that the State militia had been drafted into the Federal service and the State therefore was without its normal militia protection. Governor Campbell recommended to the Secretary of War that an immediate investigation of the situation at Bisbee be made by a Regular Army officer in order to ascertain the need of troops. The Governor's recommendation was followed and an investigation of the situation in Bisbee was made by an experienced officer. Such investigation was made on June 30 and again on July 2, after both investigations the officer reported that everything was peaceable and that troops were neither needed nor warranted under existing conditions.

4. That the conditions in Bisbee were in fact peaceful and free from any manifestations of disorder or violence is the testimony of reputable citizens, as well as of officials of the city and county, who are in a position to report accurately and speak without bias.

5. Early on the morning of July 12 the sheriff and a large armed force presuming to act as deputies under the sheriff's authority, comprising about 2,600 men, rounded up 1,186 men in the Warren district, put them aboard a train, and carried them to Columbus, N. Mex. The authorities at Columbus refused to permit those in charge of the deportation to leave the men there, and the train carried them back to the desert town of Hermans, N. Mex., a nearby station. The deportees were wholly without adequate supply of food and water and shelter for 2 days. At Hermans the deported men were abandoned by the guards who had brought them, and they were left to shift for themselves. The situation was brought to the attention of the War Department, and on July 14 the deportees were escorted by troops to Columbus, N. Mex., where they were maintained by the Government until the middle of September.

6. According to an Army census of the deported men, 109 were native-born Americans, 468 were citizens, 472 were registered under the selective-draft law, and 433 were married. Of the foreign born, over 20 nationalities were represented, including 141 British, 82 Serbians, and 170 Slavs. Germans and Austro-Hungarians (other than Slavs) were comparatively few.

7. The deportation was carried out under the sheriff of Cochise County. It was formally decided upon at a meeting of citizens on the night of July 11, participated in by the managers and other officials of the Copper Queen Consolidated Mining Co. (Phelps-Dodge Corporation, Copper Queen division), and the Calumet & Arizona Mining Co. Those who planned and directed the deportation purposely abstained from consulting about their plans either with the United States attorney in Arizona, or the law officers of the State or county, or their own legal advisers.

8. In order to carry the plans for the deportation into successful execution, the leaders in the enterprise utilized the local offices of the Bell Telephone Co., and exercised or attempted to exercise a censorship over parts of interstate connections of both the telephone and telegraph lines in order to prevent any knowledge of the deportation reaching the outside world.

9. The plan for the deportation and its execution are attributable to the belief in the minds of those who engineered it that violence was contemplated by the strikers and sympathizers with the strikers who had come into the district from without, that life and property would be insecure unless such deportation was undertaken, and that the State was without the necessary armed force to prevent such anticipated violence and to safeguard life and property within the district. This belief has no justification in the evidence in support of it presented by the parties who harbored it.

10. Neither such fear on the part of the lenders of the deportation as to anticipated violence nor evidence justifying such fear was ever communicated to the Governor of the State of Arizona with a view to renewing the request for Federal troops, based upon changing conditions, nor were the Federal authorities in fact ever apprised that a change of conditions had taken place in the district from that found by the investigating Army officer to call for or warrant the interposition of Federal troops.

11. The deportation was wholly illegal and without authority in law, either State or Federal.

Following the deportation of the 12th, in the language of Governor Campbell of Arizona, "the constitutional rights of citizens and others have been ignored by processes not provided by law, viz, by deputy sheriffs, who refused persons admittance into the district and the passing of judgment by a tribunal without legal jurisdiction resulting in further deportations."

13. Immediately after the first deportation, and until later in August, the function of the local judiciary was usurped by a body which to all intents and purposes was a vigilance committee, having no authority whatever in law. It caused the deportation of large numbers of others. So far as this committee is concerned, its activities were abandoned at the request of the Governor of Arizona late in August.

14. Among those who were deported from the district and who thereafter were arrested in seeking entrance into it were several who were registered under the selective-draft law and sought to return or remain in the district in order to discharge their legal duty of reporting for physical examination under the draft.

These findings of facts make certain recommendations by the President's Mediation Commission inevitable:

1. All illegal practices and the denial of rights safeguarded by the Constitution and statutes must at once cease. The right of unimpeded admittance into the Warren district of all who seek entrance into it in a lawful and peaceful manner must be respected. The right of all persons freely to move about in the Warren district or to continue to reside within it must be scrupulously observed except insofar as such right is restricted by the orderly process of the law. To this end we have directed letters to Governor Campbell and Sheriff Wheeler of Cochise County, of which copies, together with Sheriff Wheeler's acknowledgment, are appended.

2. Insofar as the deportation of July 12 and the events following constitute violations of the laws of Arizona, we join in the recommendation of Governor Campbell that the responsible officers of the State and county pursue appropriate remedies for the vindication of such laws.

3. Insofar as the evidence before the commission indicates interference with the enforcement of the selective-draft law, the facts should be brought to the attention of the Attorney General of the United States. A memorandum for submission to the Attorney General is appended.

4. Insofar as the evidence before the commission indicates an interference with interstate lines of communication, the facts should be submitted for appropriate attention by the Interstate Commerce Commission. A memorandum for submission to the Interstate Commerce Commission is appended.

5. Insofar as deportation such as we have set forth have not yet been made a Federal offense, it is our duty to report to the President the wisdom of recommending to the Congress that such occurrences hereafter be made criminal under the Federal law to the full extent of the constitutional authority of the Federal Government.

Respectfully submitted.

THE PRESIDENT'S MEDIATION COMMISSION,  
W. B. WILSON, *Chairman*.  
E. P. MARSH.  
JOHN H. WALKER.  
J. L. SPANGLER.

FELIX FRANKFURTER.  
*Counsel to the Commission.*



Dr. FRANKFURTER. That report made several suggestions and raised questions, I believe, for the attention of other branches of the Government, certainly for the Department of Justice. I think it said something about the possibility of new legislation. I believe the Department of Justice did begin proceedings arising out of that situation which finally went to the Supreme Court of the United States.

I had nothing whatever to do either with the *Mooney case* or the Bisbee deportation, after my functions as counsel were discharged. Not only that, Senator Borah, but because of my official connection with the President's Mediation Commission, charged with the duty of reporting on the *Mooney case*, I have abstained from expressing an opinion on the *Mooney case* or having anything whatever to do with any effort to bring about any official action by anybody in the *Mooney case*, since the date of filing that report, because I thought the quasijudicial obligation under which I rested continued after my immediate duty was discharged.

Senator BORAH. I do not care to go into it in detail, because most of it is in the record, but what, if anything, did you have to do with the attempt to recall Fickert, the State's attorney in San Francisco?

Dr. FRANKFURTER. Perhaps the best answer to that is to tell you all I know about that.

Senator BORAH. I think that may be well, because that has been discussed here.

Dr. FRANKFURTER. While that investigation was going on—I infer from your question that Fickert was up for recall rather than reelection.

Senator BORAH. The charge was made that you engineered or authorized or in some way tried to assist in getting him recalled. It was not a reelection, but a recall under the recall statute which applied in California at that time.

Dr. FRANKFURTER. That is absolutely and wholly without foundation. That is the first time I ever heard of such a charge, the first time I ever heard I was supposed to have had anything to do with it, and I categorically deny having had any relation to it whatever.

May I refer to an incident, in the way of directing attention to what may have been the origin of this strange story, and strange it is. I had served under President Theodore Roosevelt and happened to enjoy, as thousands of others did, his very kind and encouraging friendship. I had occasion to see a good deal of him, partly because he was generous towards the young men, and partly because my old chief, Mr. Stimson, was equally generous with his assistants, and through him I came to know President Roosevelt. I was devoted to him. He inspired a sense of civic service within me, as he did within so many other young men.

While in California—and here I am a little hazy, because I do not know whether I met him in San Francisco or before—I met Mr. Chester H. Rowell, well known to the committee as the editor of the San Francisco Chronicle. He was a very close friend of Colonel Roosevelt's. He talked with me about the effort to employ "T. R." if I may use a historical designation, in the local squabble concerning Fickert. I do not know whether it was an effort to recall him or get him reelected. Mr. Rowell said to me, in substance, as nearly as I can remember: "Is it not too bad trying to pull T. R. into this situation?" Those, of course, are not the exact words; that was the sub-

stance. "Is it not too bad they are trying to exploit T. R. in this local situation?"

A telegram in which Mr. Rowell and I joined was sent to Colonel Roosevelt, telling him that San Francisco was 3,000 miles away from Sagamore Hill and he could not know the local situation, and that for the sake of his own national influence he should not become involved in it. That is all I ever had to do with the general subject covered by your question.

Senator BORAH. Colonel Roosevelt was under the impression that you had something to do with it, and wrote you to that effect.

Dr. FRANKFURTER. May I correct or complete your statement, Senator Borah?

Senator BORAH. Yes.

Dr. FRANKFURTER. I have not refreshed my recollection by reading the letter, but I think the origin of that correspondence was this: I knew that Jack Greenway, of Arizona, was a very good friend of the Colonel, served with him in Cuba, and I knew he had been a beneficiary of the great devotion that Colonel Roosevelt had for his friends. Greenway was involved in the Bisbee deportations. I sent Colonel Roosevelt the Bisbee report so that he might have the findings that were made after a thorough investigation, an examination of a great number of witnesses, and a great body of testimony, so he might have the findings of one whose capacity to find facts he had been good enough to praise when I was serving under Mr. Stimson.

So I sent that report to the Colonel to let him know the facts. That produced his letter to me, and also at the same time there was that telegram in which Chester Rowell and I joined. His letter referred to the whole transaction, the report in the *Bisbee case*, as well as the telegram referred to. There was a reply on my part to the Colonel's letter, and an acknowledgment by him, a friendly acknowledgment, all of which is probably before the committee.

Senator BORAH. What was it, in your opinion, that Colonel Roosevelt had reference to when he said in his letter to you that your actions were the actions of Trotsky? Did he refer to these reports you had sent in?

Dr. FRANKFURTER. He had reference to the Bisbee report. He could not have had reference to the Mooney report because that came a little later. No. I am probably wrong. Maybe he did. He probably had both. May I save the time of the committee by saying that he could not have had anything else in mind than the performance of my duties as counsel to the President's Mediation Commission.

Senator BORAH. Have you anything to add in the matter of the controversy between Colonel Roosevelt and yourself to what you said in your reply to him?

Dr. FRANKFURTER. Not a word.

Senator BORAH. That states your position now and stated it then?

Dr. FRANKFURTER. Quite so, Senator.

Senator BORAH. I think I am through.

Senator NEELY. Senator Norris, do you desire to ask any questions?

Senator NORRIS. I have no questions.

Senator NEELY. Senator King?

Senator KING. I have no questions.

Senator NEELY. Senator Connally?

Senator CONNALLY. No questions.

Senator NEELY. Senator McCarran?

Senator McCARRAN. I should like to ask the doctor a few questions, Mr. Chairman.

Senator NEELY. You may proceed.

Senator McCARRAN. Doctor, referring to the American Civil Liberties Union, the subject having been opened up by the questions of Senator Borah, I take it that you are acquainted with the names of the members of that committee, of which you were one?

Dr. FRANKFURTER. I know some of the names. I have some of them in mind.

Senator McCARRAN. Would you take it upon yourself to look at that list and see with whom you were associated?

Dr. FRANKFURTER. I suppose I am charged with notice of that, just as anyone associated with people is supposed to take notice of his associates.

Senator McCARRAN. Did you notice that you were on that committee with Mr. Foster?

Dr. FRANKFURTER. I believe Mr. Foster was at one time a member of that committee. I do not know whether he is at this time or not.

Senator McCARRAN. You knew he was a member of that committee, which, I take it, is in the nature of a sort of advisory committee of the American Civil Liberties Union? Am I correct in that statement?

Dr. FRANKFURTER. It is a body that gives whatever strength those names give, and they are all responsible for having their names on the letterhead.

Senator McCARRAN. And as responsible for the policy forming of the union? Am I correct?

Dr. FRANKFURTER. To the extent that the general body is responsible for what the executive committee may do.

Senator McCARRAN. Would you say it was an executive committee?

Dr. FRANKFURTER. Quite the opposite; the other way round. There is an executive committee which determines the policy, with offices in New York, with a membership scattered all over the United States, with all the difficulties that that entails.

Senator McCARRAN. You have undoubtedly given considerable thought to the working of the union, have you not?

Dr. FRANKFURTER. Certainly; whatever "considerable" may be.

Senator McCARRAN. I take it that you have had drawn to your attention the various reports and statements that have been made with reference to the American Civil Liberties Union by congressional committees and others.

Dr. FRANKFURTER. That is rather a tall order, Senator McCarran. If you mean have I read the report of the Dies committee, I have not. Like every good lawyer, I pay very little attention to newspaper accounts of a trial or proceeding unless I read the whole record. I would not want to be charged with knowledge of everything that took place before a congressional committee. I have not read the report of the Dies committee; I have not read the report of the Fish committee; and I have not read the many volumes of the report of the Lusk committee of the New York Legislature. There are only 24 hours in a day.

Senator McCARRAN. Have you read any of the reports of the American Legion?

Dr. FRANKFURTER. I am sorry; I have not.

Senator McCARRAN. All those reports bear upon the activities of the American Civil Liberties Union as regards communism, and quite broad and emphatic statements are made in some of those reports. I take it from what you have said that you have not taken it upon yourself to become familiar with any of those reports?

Dr. FRANKFURTER. I have not read them. I will have to leave it to the committee to judge what responsibility is upon me to read all of such reports. I shall only say that the repetition of an error does not make it true.

Senator McCARRAN. No; the repetition of an error does not make it true; but I should think it would cause one of your high place to investigate his associates.

Dr. FRANKFURTER. I am chargeable with responsibility, which I cheerfully assume, by this committee or anyone else as to my association with the American Civil Liberties Union. The record of its activities and my relation to them is not what somebody else may have said about those activities.

Senator McCARRAN. Doctor, you were born abroad?

Dr. FRANKFURTER. I was born in Vienna on November 15, 1882, what was then Austria.

Senator McCARRAN. When did you come to the United States?

Dr. FRANKFURTER. In 1894. I ought to know the date. I came sometime in August. I was in my twelfth year.

Senator McCARRAN. You came with your family at that time, did you?

Dr. FRANKFURTER. I came with my mother, three other brothers, and one sister.

Senator McCARRAN. Had your father preceded you?

Dr. FRANKFURTER. My father had preceded us. He came as a visitor on a business trip, and he tried for a number of months to persuade my mother to follow with the children, because he fell in love with this country, as so many people similarly situated have.

Senator McCARRAN. Do you recall the year of his coming?

Dr. FRANKFURTER. Yes; he came in 1893, I believe.

Senator McCARRAN. Do you recall when he applied for citizenship?

Dr. FRANKFURTER. I have a certified copy of his naturalization papers. He died in 1916, and it has been quite a nuisance from time to time to satisfy the officials of my town, Cambridge, of the Commonwealth of Massachusetts, and of the United States, as to the date of his naturalization. Not only that, but I married before the Cable Act in 1919, and found myself in the strange position of taking a wife whose forbears for many generations had been in this country, who was born in this country, become a citizen through the jocose situation of my father's naturalization.

Senator McCARRAN. I have before me what purports to be the certificate to which you refer.

Dr. FRANKFURTER. If that is the one I sent to Mr. Acheson, that is it.

Senator McCARRAN. I procured it from Mr. Acheson this morning, he having had it before the committee on yesterday. I notice it certifies the admission to citizenship of Leopold Frankfurter in June 1898. Is that the one you have used for passport purposes?

Dr. FRANKFURTER. Quite so; passports and voting.

Senator McCARRAN. This is the only evidence you know of, I take it, of his admission? Have you looked into the records of the court in New York from which this certificate was issued?

Dr. FRANKFURTER. I do not now remember whether I wrote a letter or asked a friend in New York to get the authenticated certificate of naturalization.

Senator McCARRAN. Doctor, are you acquainted with Harold Laski?

Dr. FRANKFURTER. Oh, yes.

Senator McCARRAN. Quite well?

Dr. FRANKFURTER. Very well.

Senator McCARRAN. Was he one of your students?

Dr. FRANKFURTER. No; he is an Englishman who graduated from Oxford University. He was disqualified for service in the war for physical reasons. He was a teacher in McGill University in Montreal when I first heard of him through my friend, Mr. Norman Hapgood, who is, perhaps, known to members of the committee. Having been a Harvard man, he spoke to me about this young man, and eventually Mr. Laski became a teacher at Harvard University. He later returned to England, and become professor of political science at the University of London, and has been there ever since.

Senator McCARRAN. Have you ever read any of his publications?

Dr. FRANKFURTER. Oh, certainly.

Senator McCARRAN. Do you agree with his doctrine?

Dr. FRANKFURTER. I trust you will not deem me boastful, if I say I have many friends who have written many books, and I shouldn't want to be charged with all the views in books by all my friends.

Senator McCARRAN. You can answer that question simply.

Dr. FRANKFURTER. No; I cannot answer it simply. If you have a recent book of his, you will find the list of books he has written, some 12 or 15 or 20. He is an extraordinarily prolific writer. How can I say I agree with his doctrine? That implies that he has a doctrine.

Senator McCARRAN. Do you know whether or not he has a doctrine?

Dr. FRANKFURTER. I assume he has more than one. All people have.

Senator McCARRAN. I refer now to a publication entitled "Communism," and ask you whether you have read that?

Dr. FRANKFURTER. I have read it.

Senator McCARRAN. Do you subscribe to his doctrine as expressed in that volume?

Dr. FRANKFURTER. Senator McCARRAN, how can I answer that question without making a speech about my views on government and the relations of the various branches of government to one another?

Senator McCARRAN. You say you have read it and know the author, and you know the sentiment prevailing in this country now in regard to socialism and communism. If you have read this small volume, you can surely answer whether you subscribe to the doctrine?

Dr. FRANKFURTER. Have you read the book?

Senator McCARRAN. I have just casually glanced at it.

Dr. FRANKFURTER. What would you say is its doctrine?

Senator McCARRAN. The doctrine is the advocacy of communism.

Dr. FRANKFURTER. You see, we could debate all day on whether that is in fact the doctrine of that book.

Senator McCARRAN. Do you believe in the doctrine set forth in this book?

Dr. FRANKFURTER. I cannot answer, because I do not know what you regard as the doctrine. You have never read it. I understand that it is a study of certain beliefs, of a theory called communism. So far as I know, it would be impossible for me to say whether I agree with the doctrine in that book or not, because I think it is impossible to define what the doctrine is.

Senator McCARRAN. If it advocates the doctrine of Marxism, would you agree with it?

Dr. FRANKFURTER. Senator, I do not believe you have ever taken an oath to support the Constitution of the United States with fewer reservations than I have or would now, nor do I believe you are more attached to the theories and practices of Americanism than I am. I rest my answer on that statement.

Senator McCARRAN. Is that all the answer you want to make? Do you prefer to let your answer to the question I propounded rest in that form?

Dr. FRANKFURTER. I do, sir.

Senator KING. Do you believe in what might be called the ideology of Marx or Trotsky?

Dr. FRANKFURTER. It would be terribly easy for me to answer that question, Senator King. I withhold any further discussion, not because there is any secret about my views or feelings, but because I am in a position in which I cannot help it. It may be that I shall be called to a position that might be very embarrassing. If I were before this committee for any political office, nothing would give me more pleasure than to pursue the line of inquiry of Senator McCarran and Senator King. I think I can appeal to the common understanding of lawyers that this is not a situation in which one can speak freely. I prefer to rest it on the general statement I made to Senator McCarran. You will have to decide, in the light of my whole life, what devotion I have to the American system of government.

Senator NEELY. Senator Austin, do you desire to ask any questions?

Senator AUSTIN. Dr. Frankfurter, certain information has been taken from an article purporting to be signed by you, and I am asking you only this question, whether you did write this or whether you did not write it. If you care to volunteer your views on the subject after answering the question, I shall be glad to have you do so. I ask only the question of fact. The information to which I refer was taken from the Encyclopedia of the Social Sciences, volume 14, page 478, relating to the year 1934, and is as follows:

Indeed all efforts to enable the Supreme Court adequately to discharge its essential functions foundered on the circuit court system. Instead of the obvious remedy, various mechanical devices for keeping abreast of the Supreme Court docket were urged. With the too frequent misconception as to the nature of the judicial business and the conditions for its wise disposition, it was assumed that more business calls for more judges. The first Judiciary Act provided for a Supreme Court of 6 members, which was increased to 7 in 1807, and to 9 in 1837, subject to short fluctuations from a tribunal of 10 to one of 7 between the years of 1803 to 1809. This has remained the size of the Court. There is no magic in the number 9, but there are limitations to effective judicial action. The liberation by the Court is the very foundation of sound adjudication as is also a lively sense of responsibility by every member of the Court for its collective judgment. Experience is conclusive that to enlarge the size of the Supreme Court would be self-defeating. When this recurring proposal

for increasing the number of Justices was once more made by the American Bar Association in 1922, Chief Justice Taft authoritatively rejected it.

Did you write that?

Dr. FRANKFURTER. I assume, Senator Austin, that is a correct transcript of part of the article I wrote for the Encyclopedia of Social Sciences. It sounds like it. I wrote that article, and I have no doubt that is a part of it.

You were good enough to suggest that I might make a comment. Perhaps this is a proper comment, and I hope you will indulge me in it. In that article I expressed views concerning questions that are at this very moment pending before the Supreme Court of the United States, and have been pending before that Court for some time, indeed a longer time than some other cases that have already been decided. The gentlemen of the Judiciary Committee know the difficulties sometimes created in matters of this kind when there is a Court of eight, and if it should be the fact that in that article I have expressed views on matters now pending before the Court, I think you will see the wisdom of my not saying another word about it.

Senator AUSTIN. Thank you.

Senator KING. Similar statements to those just read by the Senator from Vermont appear in the book written by you and Mr. Landis some years ago, of which you approved, of course.

Dr. FRANKFURTER. Whatever I wrote in that book, I wrote, if I may say so. I have not refreshed my mind on the general subject matter dealt with in that book. To trace the history of the judiciary acts from 1789, as that book did, involved reading all of the records of this committee since 1789, and all speeches made by members of the committee on the floor of the Senate on that subject. I assume the general subject matter was dealt with in the book.

Senator KING. That was not the only statement made by you relative to the Supreme Court, but in the book to which I have referred there were similar statements, written by you or Mr. Landis, or by both.

Dr. FRANKFURTER. I have full responsibility for every word in that book. Except for encumbering the record I would be glad to incorporate the book by reference at least, if the publishers would not object.

Senator BORAH. Mr. Chairman, I ask that the reporter read the answer of Dr. Frankfurter to the question propounded by Senator McCarran in relation to the book entitled "Communism."

Senator NEELY. The reporter will read the answer.

(The answer referred to was thereupon read by the reporter, as follows:)

I do not believe you have ever taken an oath to support the Constitution of the United States with fewer reservations than I have or would now, nor do I believe you are more attached to the theories and practices of Americanism than I am. I rest my answer on that statement.

Senator BORAH. Dr. Frankfurter, when you say "theories and practices," do you mean also the principles?

Dr. FRANKFURTER. By "theories" I meant principles. I mean the doctrines that led to the formation of the Union, that body of principles that the great founders from Washington down represented in their lives, their messages, and their activities. I certainly did not mean to exclude principles from theories, Senator Borah.

Senator BORAH. That is all, so far as I am concerned.

Senator NEELY. Senator Hughes, have you any questions?

Senator HUGHES. I think not.

Senator NEELY. Senator Danaher?

Senator DANAHY. No questions.

Senator McCARRAN. May I ask another question, Mr. Chairman?

Senator NEELY. Certainly.

Senator McCARRAN. Doctor, going a little further into your explanations of these matters, do you believe in the Constitution of the United States?

Dr. FRANKFURTER. Most assuredly.

Senator McCARRAN. I am very glad to get that positive answer from you.

Dr. FRANKFURTER. I infer that your question does not imply that you had any doubt about it.

Senator NEELY. Gentlemen of the committee, do you desire to ask Dr. Frankfurter any other questions?

If not, Dr. Frankfurter, the chairman, with great reluctance, propounds one inquiry which he thinks ought to be answered as a matter of justice to you. Some of those who have testified before the committee have, in a very hazy, indefinite way, attempted to create the impression that you are a Communist. Therefore, the Chair asks you the direct question: Are you a Communist, or have you ever been one?

Dr. FRANKFURTER. I have never been and I am not now.

Senator McCARRAN. By that do you mean that you have never been enrolled as a member of the Communist Party?

Dr. FRANKFURTER. I mean much more than that. I mean that I have never been enrolled, and have never been qualified to be enrolled, because that does not represent my view of life, nor my view of government.

Senator NEELY. Dr. Frankfurter, the subcommittee appreciates your appearance and the opportunity which you have afforded the members to become acquainted with you. I am personally very much obliged to you.

Dr. FRANKFURTER. Senator, I am very much obliged to you and to the subcommittee.

Senator NEELY. The hearing on the nomination of Dr. Frankfurter is concluded, and the subcommittee now adjourns, but will convene in executive session before the end of the day to vote on the confirmation of Dr. Frankfurter.

(Whereupon, at 12 noon the hearing was closed, and the subcommittee adjourned.)